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REPORTS

OF

CIVIL AND CRIMINAL CASES

DECIDED BY THE

COURT OF APPEALS

OF KENTUCKY.

VOLUME XIII.
EDWARD W. HINES, REPORTER.

VOLUME 95—KENTUCKY REPORTS,
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JUDICIAL OFFICERS OF THE STATE.

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(As constituted since reorganization on first Monday in January, 1896.)

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* Appointed by Governor February 21, 1895, to fill vacancy caused
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† Died August 9, 1894. Succeeded by Hon. ISAAC M. QUIGLEY,
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* Elected in November, 1892, for term of five years, beginning January 1, 1893.

† Appointed by Governor January 14, 1895, to fill vacancy caused by resignation of Hon. John R. Grace.

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TABLE OF CASES REPORTED.

Accident Co., Couadeau v.	280
Addams, Clerk, Commonwealth, by, &c., v.	588
Aims, &c., v. Conn, &c.	98
Alford v. Wilson, &c.	506
American Accident Co., Couadeau v.	280
Arnett, &c., Cooper v.	603
Asher v. Brock, &c.	270
Auditor, McDonald v.	598
Aultman-Taylor Co. v. Frasure, &c.,	429
Bacon v. Kentucky Cent. R. Co.	873
Bank v. Cornwall & Bro.'s ass'ee	512
Bank v. D. Kiefer Milling Co.	97
Bank v. Hill, &c.	512
Bank v. Wilgus' ex'ors	309
Bankston, &c., v. Crabtree Coal Mining Co.	455
Barbour, &c., Northwestern Mut. Life Ins. Co. v.	7
Barnett, Bent & Co. v.	499
Barnett, Commonwealth v.	302
Beard, &c., v. City of Hopkinsville, &c.	239
Bennett v. Bennett	545
Bent & Co. v. Barnett	499
Berry, Commonwealth v.	443
Berry, Hansford v.	56
Biggerstaff's ex'ors v. Biggerstaff's adm'r	154
Bigstaff, &c., Jones, &c., v.	395
Bird, &c., v. Board of Commissioners of Kenton County	195
Bishop, Shinkle's ass'ee v.	84
Blankenship, &c., v. Ross	306
Board of Aldermen, Gibbs v.	471
Board of Commissioners of Kenton County, Bird, &c., v.	195
Boyd County, &c., v. Ross	167
Branham, &c., Magowan v.	581
Bristow, Shinkle's ass'ee v.	84
Broadus v. Mason	421
Brock, &c., Asher v.	270
Buchannon v. Commonwealth	384
Bullock, &c., v. Grinstead & Co.	261
Bush, &c., v. Robinson	492
Caperton, &c., v. Humpick	105
Carder & Vallandigham v. Weisenburgh	135
Carrico, Nashville, &c., R. Co. v.	489
Carter's adm'r, Schmidt v.	1
Central Pass. R. Co., Louisville Bagging M'fg Co. v.	50

 Chaffin v. Fulkerson. Cornwall & Bro.'s Ass'ee, Merch. Nat'l Bank v.

Chaffin v. Fulkerson	277
Chesapeake, &c., R. Co., Volz v.	188
City of Hopkinsville, &c., Beard, &c., v.	239
City of Louisville v. Johnson	254
City of Owensboro v. Weir, Weir & Walker	158
City of Paris, Ky. Cent. R. Co. v.	627
Clay, Louisville Gas Co. v.	363
Cloherly, Collopy v.	330
Cockrill v. Commonwealth	22
Coleman-Bush Inv. Co. v. Figg, Trustee	403
Collopy v. Cloherly	330
Commonwealth v. Barnett	302
Commonwealth v. Berry	443
Commonwealth, Buchannon v.	334
Commonwealth, Cockrill v.	22
Commonwealth, Davis v.	19
Commonwealth v. Day	120
Commonwealth, Doolin, &c., v.	29
Commonwealth, Evans v.	231
Commonwealth, Eversole v.	623
Commonwealth, Green v.	326
Commonwealth, Green, &c., v.	233
Commonwealth, Haverly v.	33
Commonwealth v. Hutton	302
Commonwealth, Kirkpatrick v.	326
Commonwealth v. Murphy	38
Commonwealth, Oliver v.	372
Commonwealth, Omer v.	353
Commonwealth, Pence v.	618
Commonwealth v. Railroad Companies	60
Commonwealth, Risner v.	539
Commonwealth, Shouse v.	621
Commonwealth, Smith v.	322
Commonwealth v. Three Forks Coal Co.	273
Commonwealth, Whittaker v.	632
Commonwealth, Williams v.	326
Commonwealth, by, &c., v. Addams, Clerk	588
Conn, &c., Aims, &c., v.	93
Conn, &c., Malone v.	93
Cooper v. Arnett, &c.	603
Coots v. Yewell, &c.	367
Copas, Lou. & Nash. R. Co. v.	460
Cornwall's ass'ee, Gray v.	566
Cornwall & Bro.'s ass'ee, Bank v.	512
Cornwall & Bro.'s ass'ee, Hill, &c., v.	512
Cornwall & Bro.'s ass'ee, Merchants Nat'l Bank v.	512

 Couadeau v. American Accident Co. Johnson, City of Louisville v.

Couadeau v. American Accident Co.	280
Crabtree Coal Mining Co., Bankston, &c., v.	465
Davis v. Commonwealth	19
Day, Commonwealth v.	120
Dechamp, &c., Henderson Belt R. Co. v.	219
D. Kiefer Milling Co., First Nat'l Bank of Covington v.	97
Doolin, &c., v. Commonwealth.	29
Ernst v. Shinkle	608
Evans v. Commonwealth	281
Eversole v. Commonwealth	628
Farmers & Drivers Bank v. Hill, &c.	512
Figg, Trustee, Coleman-Bush Investment Co. v.	408
First Nat'l Bank of Covington v. D. Kiefer Milling Co.	97
Flinsbach, &c., Meier v.	189
Frasure, &c., Aultman-Taylor Co. v.	429
Fry, &c., v. Jones, &c.	148
Fulkerson, Chaffin v.	277
Fuqua & Smith v. Massie & Sons	387
George T. Staggs Co. v. Taylor & Sons	651
Gibbs v. Board of Aldermen	471
Goldsmith v. Owen, Judge	420
Graded School District v. Trustees of Bracken Academy	436
Gray v. Cornwall's ass'ee	566
Green v. Commonwealth	326
Green, &c., v. Commonwealth	283
Grinstead & Co., Bullock, &c., v.	261
Gunther & Sons, Piper v.	115
Hackett, adm'r, v. Louisville, &c., R. Co.	286
Hansford v. Berry	56
Hardwick v. Kean, rec'r	563
Haverly v. Commonwealth	88
Hawkins & Co., Parkland Hills Blue Lick Co. v.	502
Hedger, &c., v. Judy, &c.	557
Henderson Belt R. Co. v. Dechamp, &c.	219
Henderson Belt R. Co. v. Schlamp	219
Henderson Bridge Co. v. O'Connor & McCulloch	633
Hill, &c., v. Cornwall & Bro.'s ass'ee	512
Hill, &c., Farmers and Drivers Bank v.	512
Hopkinsville, City of, Beard, &c., v.	239
Humpick, Caperton, &c., v.	105
Hutton, Commonwealth v.	302
Insurance Co. v. Barbour, &c.	7
Insurance Co., Couadeau v.	280
Jackson v. Roberts, adm'r, &c.	410
John C. Lewis Co. v. Scott	484
Johnson, City of Louisville v.	254

Johnson v. Wilson. Nall, &c., v. Miller.

Johnson v. Wilson	415
Johnson, &c., v. Stivers, &c.	128
Johnson's ex'ors, Payne, &c., v.	175
Jones, Fry, &c., v.	148
Jones v. Lou. & Nash. R. Co.	576
Jones, &c., v. Bigstaff, &c.	895
Judy, &c., Hedger, &c., v.	557
Kean, Receiver, Hardwick v.	563
Kelly v. Toney, Judge	838
Kentucky Central R. Co., Bacon v.	873
Kentucky Central R. Co. v. City of Paris	627
Kentucky Midland R. Co., Lou. & Nash. R. Co. v.	550
Kirkpatrick v. Commonwealth	826
Kirksey v. Turner	226
Lacey v. Lacey	110
Lewis Company v. Scott	484
Lewis, &c., v. Citizens Nat'l Bank	79
Louisville, City of, v. Johnson	254
Louisville & Nashville R. Co. v. Copas	460
Louisville & Nashville R. Co., Jones v.	576
Louisville & Nashville R. Co. v. Ky. Midland R. Co.	550
Louisville & Nashville R. Co., Martin v.	612
Louisville & Nashville R. Co., Schmidt, Trustee, v.	289
Louisville & Nashville R. Co., Smith, by, &c., v.	11
Louisville & Nashville R. Co. v. Whitley Co. Court	215
Louisville & Nashville R. Co. v. Williams	199
Louisville, &c., R. Co., Hackett, adm'r, v.	286
Louisville Bagging M'fg Co. v. The Central Passenger R. Co.	50
Louisville Courier-Journal Co., Vance v.	41
Louisville Gas Co. v. Clay	363
Louisville Industrial School of Reform, Williamson, by, &c., v.	251
McBrayer, ex'or, v. McBrayer's ex't'x	475
McDonald v. Norman, Auditor	593
McRoberts, &c., Rawlings, &c., v.	846
Magowan v. Branham, &c.	581
Malone v. Conn, &c.	93
Martin, adm'r, v. Lou. & Nash. R. Co.	612
Mason, Broadus v.	421
Massie & Sons, Fuqua & Smith v.	887
Meier v. Flinsbach, &c.	139
Mendenhall, &c., v. Tungate, &c.	208
Merchants Nat'l Bank v. Cornwall & Bro.'s ass'ee	512
Miller, Nall, &c., v.	448
Murphy, Commonwealth v.	38
Myers, &c., Thompson, &c., v.	597
Nall, &c., v. Miller	448

Nashville, &c., R. Co. v. Carrico. Schmidt v. Carter's Adm'r.

Nashville, &c., R. Co. v. Carrico	489
National Exchange Bank of Lexington v. Wilgus' ex'rs	309
Newport News, &c., Co., Vertrees' adm'r v.	314
Newsome v. Newsome	383
Nisbet, &c., Whalen v.	464
Norman, Auditor, McDonald v.	593
Northwestern Mut. Life Insurance Co. v. Barbour, &c.	7
O'Connor & McCulloch v. Henderson Bridge Co.	633
Oliver v. Commonwealth	372
Omer v. Commonwealth	353
Owen, Judge, Goldsmith v.	420
Owensboro, City of, Weir, Weir & Walker v.	158
Owensboro, Falls of Rough, &c., R. Co., Commonwealth v.	60
Paris, City of, Kentucky Central R. Co. v.	627
Parkland Hills Blue Lick Water Co. v. Hawkins & Co.	502
Parrish, &c., v. Ross	318
Payne, &c., v. Johnson's ex'ors	175
Pence v. Commonwealth	618
Piper v. Gunther & Sons	115
Railroad Co., Bacon v.	373
Railroad Co. v. Carrico	489
Railroad Co. v. City of Paris	627
Railroad Co., Commonwealth v.	60
Railroad Co. v. Copas	460
Railroad Co. v. Dechamp, &c.	219
Railroad Co., Hackett, adm'r, v.	236
Railroad Co., Jones v.	576
Railroad Co. (L. & N.) v. Ky. Midland R. Co.	550
Railroad Co., Martin v.	612
Railroad Co. v. Schlamp	219
Railroad Co., Schmidt, Trustee, v.	289
Railroad Co., Smith, by, &c., v.	11
Railroad Co., Vertrees' adm'r v.	314
Railroad Co., Volz v.	188
Railroad Co. v. Whitley County Court	215
Railroad Co. v. Williams	199
Rawlings, &c., v. McRoberts, &c.	346
Risner v. Commonwealth	539
Roberts, adm'r, &c., Jackson v.	410
Robinson, Bush, &c., v.	492
Ross, Blankenship, &c., v.	306
Ross, Boyd County, &c., v.	167
Ross, Parrish, &c., v.	318
Schlamp, Henderson Belt R. Co. v.	219
Schmidt v. Carter's adm'r	1

Schmidt v. Mitchell, &c. Yewell, &c., Coots v.

Schmidt v. Mitchell, &c.	342
Schmidt, Trustee, v. Lou. & Nash. R. Co.	289
Scott, John C. Lewis Co. v.	484
Sears' heirs v. Sears' heirs	173
Shinkle, Ernst v.	608
Shinkle's ass'ee v. Bishop	84
Shinkle's ass'ee v. Bristow	84
Shouse v. Commonwealth	621
Smith v. Commonwealth	322
Smith, by, &c., v. L. & N. R. Co.	11
Stagg (Geo. T.) Co. v. Taylor & Sons	651
Stivers, &c., v. Johnson, &c.	128
Taylor & Sons, Geo. T. Stagg Co. v.	651
Teague, Wilson, &c., v.	48
Thompson, &c., v. Myers, &c.	597
Three Forks Coal Co., Commonwealth v.	278
Toney, Judge, Kelly v.	338
Trustees of Bracken Academy, Graded School District v.	436
Tungate, &c., Mendenhall, &c., v.	208
Turner, Kirksey v.	226
Vance v. Louisville Courier-Journal Co.	41
Vertrees' adm'r v. Newport News, &c., Co.	314
Volz v. Chesapeake, &c., R. Co.	188
Weir, Weir & Walker, City of Owensboro v.	158
Weisenburgh, Carder & Vallandigham v.	135
Whalen v. Nisbet, &c.	464
Whitley County Court, Lou. & Nash. R. Co. v.	215
Whittaker v. Commonwealth	632
Wilgus' ex'ors, National Exchange Bank v.	309
Williams v. Commonwealth	326
Williams, Lou. & Nash. R. Co. v.	199
Williamson, by, &c., v. Louisville Industrial School of Reform	261
Wilson, Johnson v.	415
Wilson, &c., Alford v.	506
Wilson, &c., v. Teague	47
Yewell, &c., Coots v.	367

TABLE OF CASES CITED, EXPLAINED, &c.

Allen v. Willard, 87 Pa. St., 380	286
American Accident Co. v. Reigart, 92 Ky., 142	344
Anderson v. Holland, &c., 14 Bush, 147	443
Backhouse v. Crosby, 2 Eq. Cas. Abr. 32, par. 44	380
Backhouse v. Mohun, Swanst., 434	380
Bailey v. Villier, 6 Bush, 27	134
Baldwin v. C., R. I. & P. R. Co., 50 Iowa, 680	203
Bank v. Baumeister, &c., 87 Ky., 12	377
Bank v. Eisenman, &c., 94 Ky., 88	667
Bank v. Keizer, 2 Duv., 169	533
Bank v. Kenney's ass'ee, 79 Ky., 183	534
Bannon v. Moran, 12 Ky., L. R., 989	134
Barbour v. Pate, 2 Mon., 8	376
Basshor v. Forbes, 36 Md., 134	497
Best v. Conn, 10 Bush, 36	409
Blagge v. Miles, 1 Story, 426	183
Bohannon v. Commonwealth, 8 Bush, 481	84
Boucher v. Vanbuskirk, 2 A. K. Mar., 345	376
Bowman v. Wickliffe, 15 B. M., 84	58
Bracken County Com'srs v. Daum, 80 Ky., 388	170
Bradley v. White, 10 Met., 303	393
Bransom's adm'r v. Labrot, 81 Ky., 641	238
Breckenridge v. Brooks, 2 A. K. Mar., 335	643
Broadbuss v. Broadbuss, 10 Bush, 300	131
Brown v. Eastern Slate Co., 134 Mass., 590	497
Brown's adm'r v. Mattingly, 12 Ky. L. R., 369	602
Bruce v. Burdet, 1 J. J. M., 80	643
Buck v. Colbath, 3 Wall, 334	565
Burdett v. Phillips & Bro., 78 Ky., 246	103
Bush v. Lisle, 89 Ky., 401	181
Butler, &c., v. McMillan, &c., 88 Ky., 417	458
Cain, adm'r, &c., v. Cain, adm'r, &c., 12 Ky. L. R., 635	134
Carson v. Carson's ex'or, 1 Met., 300	598
Carter v. Flexner, 92 Ky., 400	523
Carter v. Mitchell, 94 Ky., 261	312
Casey's adm'r v. L. & N. R. Co., 84 Ky., 79	194
Cason v. Cason, 79 Ky., 558	114
Cavanaugh v. Corekran, &c., 11 Ky. L. R., 855	133
Chamberlain v. McAllister, &c., 6 Dana, 358	488
City of Louisville v. Murphy, 86 Ky., 53	164
City of Louisville v. President, &c., of University, 15 B. M., 671	443
City of Newport v. Newport Gas Light Co., 92 Ky., 445	345
City of Springfield v. Edwards, 84 Ill., 626	247
Collins v. Henderson, 11 Bush, 92	73
Commonwealth v. Davidson, 91 Ky., 162	323
Commonwealth v. Hawkins, &c., 83 Ky., 246	445
Commonwealth v. Magoffin, &c., 15 Ky. L. R., 775	447
Commonwealth v. Reynolds, 89 Ky., 147	125
Commonwealth v. Williams, 14 Bush, 297	170
Commonwealth v. Yarbrough, 84 Ky., 496	170
Congress & Empire Spring Co. v. High Rock Congress Spring Co., 45 N. Y., 291	505
Conn v. Doyle, 2 Bibb., 248	171
Conner's adm'r v. Paul, 12 Bush, 147	238

Conyers v. Scott. Kean v. Tilford.

Conyers v. Scott, 94 Ky., 128	58
Culbertson v. City of Fulton, &c., 127 Ill., 30	248
Dartmouth College Case, 4 Wheat., 518	448
Davis v. Davis, 86 Ky., 82	118
Davis v. Robert, 89 Ala., 402	380
Denny v. Cabot, 6 Met., 82	398
Dively v. City of Cedar Falls, 27 Iowa, 232	250
Dorsey, &c., v. Kendall, 8 Bush, 294	175
Downing v. Bacon, 7 Bush, 680	184
Drury v. Young, 58 Md., 546	210
Duffey v. Brennan, 10 Ky. L. R., 637	488
Dunbar v. Glenn, 42 Wis., 118	504
Duncan v. Duncan, 98 Ky., 97	272
Elizabethtown, &c., R. Co. v. Combs, 10 Bush, 382	225
Farnham v. Pierce, 141 Mass., 208	252
Fayette Nat. Bank v. Kenney's ass'ee, 79 Ky., 183	534
Fee v. Taylor, 88 Ky., 259	131
Feibelman v. Packard, 109 U. S., 421	565
Fitzpatrick v. Apperson's ex'or, 79 Ky., 272	536
Fort Hill Stone Co. v. Orm's adm'r, 84 Ky., 188	194
Francis v. Burnett, 84 Ky., 80	108
Frazier v. Clark, 88 Ky., 266	486
French v. Teschemaker, 24 Cal., 518	497
Fuller v. Fuller, 88 Ky., 351	130
Funk v. Eggleston, 92 Ill., 515	183
Gibson v. Holland, L. R., 1 C. P., 1	511
Goodrich v. N. Y. Central, &c., R. Co., 41 Am. & Eng. R. Cases, 259	205-6
Gottlieb v. New York, &c., R. Co., 100 N. Y., 462	206
Graves v. Lebanon Nat'l Bank, 10 Bush, 23	447
Greenwood v. McHenry Coal Co., 14 Ky. L. R., 386	196
Hall v. Center, 40 Cal., 63	380
Harpending's ex'ors v. Wylie, &c., 14 Bush, 380	435
Harris v. Berry, 7 Bush, 118	406
Harris v. Ray, 15 B. M., 629	166
Harris Drug Co. v. Stucky, 46 Fed. Rep., 624	664-5
Hart, &c., v. Hayden, &c., 79 Ky., 346	536
Hatton v. Gray, 2 Ch. Cas., 164	380
Hawralty v. Warren, 18 N. J. Eq., 124	377
Henderson's adm'r v. Ky. Cent. R. Co., 86 Ky., 389	237
Henderson Bridge Co. v. O'Connor & McCulloch, 88 Ky., 308	639
Herbert's guardian v. Herbert's ex'or, 85 Ky., 147	370
Hikes v. Crawford & Long, 4 Bush, 19	312
Hill v. Phillips, &c., 87 Ky., 169	188
Hoffman v. New York Central & Hudson River R. Co., 87 N. Y., 25	15
Holzhauser v. City of Newport, 94 Ky., 396	245
Hourigan v. Commonwealth, 94 Ky., 520	325
Howard v. Daly, 61 N. Y., 362	487
Hunter, in re. 1 Edw. Ch., 1	380
Indianapolis, &c., R. Co. v. Flanagan, 77 Ill., 365	208
Inhabitants of Springfield v. Conn. River R. Co., 4 Cush., 72	218
Insurance Co. v. Reigart, 92 Ky., 142	344
Johnson v. Dodgson, 2 M. & W., 653	511
Johnson, &c., v. Sweat, &c., 81 Ky., 392	458
Jones v. Clifton, 101 U. S., 225	526
Jones v. Noble, &c., 3 Bush, 697	576
Jordan's adm'r v. Cincinnati, &c., R. Co., 89 Ky., 40	237
Kansas City, &c., R. Co. v. Burton, 53 Am. and Eng. R. Cases, 115	615
Kean v. Tilford, 81 Ky., 600	97

Kelly v. Toney, Judge, &c. Railroad Co. v. Cavens' Adm'r.

Kelly v. Toney, Judge, &c., 95 Ky., 338	346
Kennedy v. Commonwealth, 14 Bush, 352	36
King's heirs v. Morris & Snell, 2 B. M., 99	451
Kutter v. Smith, 2 Wall, 499	574
Law v. The People, 87 Ill., 385	245, 249
Lawrence v. Butler, 1 Schoales & L., 18	379
Lawrence Co. v. Chatteroi R. Co., 81 Ky., 225	219
Litz v. Goosling, &c., 93 Ky., 185	376
Longest v. Tyler, M S. Op.	134
Loomis v. Marshall, 12 Conn., 69	393
Louisville, City of, v. Murphy, 86 Ky., 53	164
Louisville Banking Co. v. Eisenman, &c., 94 Ky., 83	667
Louisville, City of, v. President, &c., University, 15 B. M., 671	443
Louisville Industrial School of Reform v. City of Louisville, 88 Ky., 584	840, 845
Louisville & Nashville R. Co. v. Brooks' adm'r, 83 Ky., 129	193
Louisville & Nashville R. Co. v. Collins, 2 Duv., 114	190
Louisville & Nashville R. Co. v. Earl's adm'r, 94 Ky., 868	615
Louisville & Nashville R. Co. v. Filburn's adm'r, 6 Bush, 574	192
Louisville & Nashville R. Co. v. Moore, 83 Ky., 675	194
Louisville & Nashville R. Co. v. Robinson, 4 Bush, 508	191
Louisville & Nashville R. Co. v. Zaring, 9 Ky. L. R., 107	681
Louisville, &c., R. Co. v. Cavens' adm'r, 9 Bush, 559	192
Louisville Water Co. v. Clark, 143 U. S., 1	71
Lucking's adm'r v. Gegg, 12 Bush, 300	536
Lynch v. Reynolds, 6 Bush, 547	171
McCullough's adm'r v. Anderson, 90 Ky., 126	184
McLean v. Fleming, 96 U. S., 245	670
Macklin's ex'or v. Crutcher, 6 Bush, 401	312
Mallory v. Travelers Ins. Co., 47 N. Y., 52	285
Maraman v. Maraman, 4 Met., 89	531
Mattingly v. Stone, 12 Ky. L. R., 76	668
Meek v. McCall, 80 Ky., 375	138
Mercer v. Mercer, 87 Ky., 21	131
Miller v. Shackleford, 8 Dana, 292	458
Newburger v. Adams, 92 Ky., 27	272, 510
Newcomb's ex'or v. Newcomb, 18 Bush, 562	175
Newman, &c., v. Alvord, &c., 51 N. Y., 189	504
Newport, City of v. Newport Gas Light Co., 92 Ky., 445	345
Newport News, &c., Co. v. Dentzel's adm'r, 91 Ky., 46	237
Northern Bank of Kentucky v. Keizer, 2 Duv., 169	533
O'Daniel v. O'Daniel, 88 Ky., 185	58
Oder v. Commonwealth, 80 Ky., 32	34
Page v. Hughes, 2 B. M., 439	379
Parkhurst v. Van Cortlandt, 1 Johns., ch. 282	379
Perry v. House of Refuge, 63 Md., 20	252
Phillips v. Phillips, 9 Bush, 183	548
Porschet v. Porschet, 82 Ky., 93	131
Power v. Power, 12 Ky. L. R., 793	96
Power v. Reeder, 9 Dana, 6	643
Pribble v. Hall, 13 Bush, 61	434
Prince v. City of Quincy, 105 Ill., 138	249
Pryor v. Castleman, 9 Ky. L. R., 967	371
Pullen v. C. & O. R. Co., 5 Biss. U. S. C. C., 237	299
Railroad Co. v. Brook's adm'r, 83 Ky., 129	193
Railroad Co. v. Burton, 58 Am. and Eng. R. Cases, 115	615
Railroad Co. v. Cavens' adm'r, 9 Bush, 559	192

 Railroad Co. v. Collins. Wise, &c., v. Foote, &c.

Railroad Co. v. Collins, 2 Duv., 114	190
Railroad Co. v. Combs, 10 Bush, 382	225
Railroad Co. v. Cox, 145 U. S., 593	566
Railroad Co. v. Dentzel's adm'r, 91 Ky., 46	237
Railroad Co. v. Earl's adm'x, 94 Ky. 368	615
Railroad Co. v. Filburn's adm'x, 6 Bush, 574	192
Railroad Co. v. Flanigan, 77 Ill., 365	203
Railroad Co. v. Moore, 83 Ky., 675	194
Railroad Co. v. Robinson, 4 Bush, 508	191
Railroad Co. v. Zaring, 9 Ky. L. R., 107	631
Remington v. Lewis, 8 B. M., 606	307
Robinson v. Bidwell, 22 Cal., 879	497
Rock v. Perkins, 139 U. S., 628	565
Rollins, &c., v. Clark, 8 Dana, 15	219
Rudd v. Planters' Bank, 78 Ky., 513	536
Sackett v. City of New Albany, 88 Ind., 478	249
Saint John v. Erie R. Co., 22 Wall, 186	299
Sawyers v. Cator, 8 Humph., 280	401, 403
Scobee v. Bridges, 87 Ky., 427	601
Sherley, &c., v. Billings, 8 Bush, 147	17
Sherley, &c., v. Sherley, &c., 81 Ky., 240	131
Shrader v. Wilhite, &c., 11 Ky. L. R., 954	133
Smith v. Ryan, 88 Ky., 636	276
Smith v. Telegraph Co., 83 Ky., 269	473
Smith v. Young, &c., 11 Bush, 393	536
Souffrain v. McDonald, 27 Ind., 269	380
Spalding, &c., v. Wilson & Muir, 80 Ky., 589	523
Spratt's ex'ors v. First Nat'l Bank, 84 Ky., 85	534
Stevens v. Wyatt, 16 B. M., 542	417
Stover v. Boswell, &c., 3 Dana, 233	309
Symonds v. Jones, 17 Am. St. Rep., 485	669
Talbott v. Thorn, 91 Ky., 417	58
Texas, &c., Railroad Co. v. Cox, 145 U. S., 93	565
Tomlinson v. Jessup, 15 Wall., 454	74
Towanda Coal Co. v. Heeman, 86 Pa. St., 418	17
Trew v. Passenger Ass. Co., 6 Hurl & N., 838	285
Trimble v. Puckett, &c., 93 Ky., 218	5
True v. Commonwealth, 90 Ky., 651	360
Trustees Dartmouth College v. Woodward, 4 Wheat., 518	443
Trustees Va. Univ. v. State of Ind., 14 How., 271	443
United States v. Graham, 110 U. S., 221	72
United States v. Kansas Pac. R. Co., 99 U. S., 455	299
Usher's ex'ors v. Flood, 83 Ky., 552	272, 509
Vandever v. Griffith, 2 Met., 425	172
Venable, &c., v. Beauchamp, 3 Dana, 821	399
Wagner v. Wetmore, 12 Ky. L. R., 638	195
Whipple v. Earick, 93 Ky., 121	276
White v. O'Bannon, 86 Ky., 93	272
Whitehead v. Chadwell, 2 Duv., 432	533-4
Whitney v. Clifford, 57 Wis., 157	286
Whittaker v. Sandifer, 1 Duv., 262	488
Williams v. Gooch, 3 Met., 486	547
Williams v. Jones, 14 Bush, 418	468
Wilson, &c., v. Teague, 95 Ky., 47	175
Winnegar's adm'r v. Cent. Pass. Ry. Co., 85 Ky., 547	17
Winspear v. Accident Ins. Co., 6 L. R., Q. B. Div., 42	286
Wise, &c., v. Foote, &c., 81 Ky., 15	131

RULES OF THE COURT OF APPEALS.

I. In accordance with section 118 of the Constitution, this Court, after January 1, 1895, will be divided into two departments, each one of which shall consist of three Judges, besides the Chief Justice, who shall preside over each department. Each division shall sit on alternate days during each week, when not in joint session, to hear arguments and motions and deliver opinions. Opinions shall be delivered as the judgment of the Court without reference to the department delivering them. When the Chief Justice is absent, or, if present, from any cause fails to preside, the Judge next oldest in commission shall preside with each department, and shall require the presence of a Judge from either department when necessary to constitute a majority of the entire body. The cases, when submitted, shall be assigned by the Chief Justice to each department, and in such a manner as to equalize the burden.

II. Whenever a case involves a Constitutional question, either Federal or State, or in any case where, in the opinion of the Chief Justice, the importance of the case requires, both departments shall hear the argument, whether oral or written, and pass on the questions involved; and in cases where the Judges composing one department do not concur, it shall be the duty of the Chief Justice to notify the other department, and have the questions at issue disposed of in joint session.

When a majority of either department, including the Chief Justice, shall desire a joint session for the purpose of passing on any question, or hearing any cause, the entire body shall be assembled for that purpose.

III. In all cases or appeals hereafter filed, or now filed and not submitted, it shall be the duty of the appellant to file his brief twenty days prior to the day the case is set for hearing, and the appellee to file his brief ten days prior to that time, and a failure to do so by the appellant shall cause a dismissal of the appeal without prejudice, and upon the part of appellee, he will, if in default, be required to pay the costs up to the date of filing his brief. No oral argument will be ordered or heard on the part of the party in default unless his brief is filed as herein provided. When the briefs are in, or the brief of the party not in default, an oral argument will be ordered if desired, and a time fixed for the hearing, unless the parties are ready to proceed when the case is called.

All cases will be decided as nearly as practicable in the order of their submission.

After all cases heretofore continued for argument and the submitted cases shall be disposed of, a docket embracing all pending cases will be published in sufficient time to enable parties to comply with the rules of this Court.

IV. But two oral arguments on each side will be allowed in any case, and every such argument will be limited to one hour.

- V. Records not made out in a legible handwriting, or not indexed, are to be condemned, and the Clerk making out such record to be prohibited from collecting anything therefor; and the Clerk of this Court will disregard the expense thereof in taxing cost without any special order in the case.
- VI. When two members of a department desire it a rehearing shall be granted.
- VII. When the record of a former appeal in the same cause is necessary to the decision of a subsequent appeal, or when a record already in this Court is made part of a record in another case, and not copied into the transcript, the attorney for the appellant must see to it, on pain of having the appeal dismissed, that such old record is placed with the new record before the cause is submitted.
- VIII. A party intending to move that the Clerk of the inferior Court, or the adverse party, shall be adjudged to pay the costs resulting from a violation by such Clerk or party of subsection 11, of section 787, of the Civil Code, shall make such motion at or before the submission of the cause, and not thereafter; and such motion shall indicate the portions of the record claimed to have been improperly copied, and the pages of the transcript where they may be found.
- IX. If the motion is against the Clerk, he must be served with a copy of the written motion at least five days before the cause is submitted.
- X. If an appellant or his attorney, or an appellee with a cross-appeal, or his attorney, shall, for any purpose, withdraw the record from the Clerk's custody without the special order of the Court and fail or neglect to produce it in Court on call of the case for submission or argument, the appeal or cross-appeal, on motion of the adverse party, shall be dismissed for want of proper prosecution.
- XI. Ten days' notice of a motion to affirm as a delay case must be given appellant or his attorney, otherwise such motion will not be heard until the case is called for trial on the day it is set on the Docket.
- XII. Where time is extended to file a petition for rehearing, and the time expires during vacation, or where the Court adjourns before the time for filing a petition for rehearing has expired, the filing of the petition with the Clerk in the Clerk's office within the time shall be held sufficient. The Clerk, however, has no right to extend the time for filing, and this can only be done by an order from one of the Judges.
- XIII. Petitions for rehearing shall be considered by a Judge other than the one who delivered the opinion in the case.
- XIV. There shall be held three terms of the Court of Appeals in each year, as follows:
- September Term, beginning third Monday in September, and ending the second Saturday in December.
- January Term, beginning first Monday in January, and ending the last Saturday in March.
- April Term, beginning second Monday in April, and ending first Saturday in July.

DECISIONS
OF THE
COURT OF APPEALS OF KENTUCKY.

SEPTEMBER TERM, 1893.

CASE 1—PETITION EQUITY—OCTOBER 5.

Schmidt v. Carter's Adm'r.

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APPEAL FROM LOUISVILLE LAW AND EQUITY COURT.

UNRECORDED LIEN—ATTACHMENT.—A promissory note reciting that it was for money advanced "to help pay for a house and lot on Jefferson street, between Twenty-second and Twenty-third, and on which she (the payee) holds a lien until paid" was not sufficient to create a lien as against third parties, even with notice of the existence of the writing, it being manifest, not only from the note itself, but from the allegations of the pleadings, that the lien was to be created by some subsequent agreement. Therefore, the payee of the note having appeared in this proceeding, in which an attachment was levied upon the property referred to in the note, and asserted a lien, the court properly refused to give him priority over the attaching creditor.

W. O. HARRIS FOR APPELLANT.

1. The facts stated in the petition show a resulting trust independent of contract and not affected by the statute of frauds. (Trimble v. Puckett, 14 Ky. Law Rep., 209; s.c., 93 Ky., 218; Letcher v. Letcher, 4 J. J. M., 590; Bailey v. Welch, 4 B. M., 244; Faris v. Dunn, 7 Bush, 278; Montague v. Garnett, 3 Bush, 298; Fischli v. Dumaresly, 8 Mar., 23; Pugh v. Bell, 1 J. J. M., 403; Brothers v. Porter, 6 B. M., 106.)
2. A resulting trust is not affected by Gen. Stats., chap. 63, art. 1, sec. 19, unless it appears that the party furnishing the money assented to the borrower's taking the title absolutely without recognition of the trust. (Lindsay v. Williams, 2 Duv., 475; Faris v. Dunn, 7 Bush, 278; Aynesworth v. Haldeman, 2 Duv., 566.)
3. The written contract sued on is a valid equitable mortgage. (Jones on Mortgages, secs. 163 to 168; Courtney v. Scott, 6 Litt., 457; McGee v. Davis, 4 J. J. M., 70.)

Schmidt v. Carter's Adm'r.

4. Appellant's older equity has priority over a purchaser at an attachment sale with notice. (*Baldwin v. Crow*, 86 Ky., 679; *Carroll's Code*, sec. 212, note 8, and cases cited; *Trimble v. Puckett*, 14 Ky. Law Rep., 209; s. c. 98 Ky., 218.)

MUIR, HEYMAN & MUIR FOR APPELLEES.

1. The instrument of June 8, 1889, creates no equity at all. It is only a promissory note, the latter part being merely descriptive of what the money was loaned for.
2. There was at most but an agreement to mortgage, and such an agreement can not take precedence over an attachment or execution without notice. The court should not widen the rule giving to an unrecorded mortgage priority over an attachment or execution lien where actual notice is given before a sale is had under the attachment or execution. (*Gen. Stats.*, chap. 24, sec. 10; *Barney & Smith M'fg Co. v. Hart, Receiver*, 8 Ky. Law Rep., 223.)
3. Even if a mortgage was intended, the description is so indefinite that parol testimony would be necessary to identify the property, and therefore the writing is within the statute of frauds. (*Fowler v. Lewis, &c.*, 8 Mar., 445; *Kay & Casey v. Curd*, 6 B. M., 103; *Fugate v. Hansford*, 3 Litt., 262; *Reed's Heirs v. Hornbach*, 4 J. J. M., 877; *Caskey v. Williams*, 10 Ky. Law Rep., 877; *Fox v. Courtney (Mo.)*, 20 S. W. Rep., 20; *Holmes v. Evans*, 48 Miss., 260; *King, &c.*, v. *Wood*, 7 Mo., 389; *Ives v. Armstrong*, 5 R. I., 568; *Clarke v. Chamberlin*, 112 Mass., 21; *Foree v. Dutcher*, 18 N. J. Eq., 402; *Sheid v. Stamps, &c.*, 2 Sneed, 174; *Gigos, &c.*, v. *Cochran, &c.*, 54 Ind., 596.)
4. An intervening creditor can plead the statute of frauds as against a parol contract made before his lien attached and which is executed after his lien. (*White v. O'Bannon*, 86 Ky., 93; *Jones v. Allan*, 88 Ky., 384.)
5. Specific performance is discretionary with the court, and under the circumstances of this case ought not to be decreed.

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

The executor of James G. Carter, holding a claim against one Charles E. Landrum, originating from a partnership between Landrum and this testator, had an attachment issued and levied upon a lot of ground in Louisville that Landrum had conveyed to his wife. The conveyance was held to be fraudulent, and the lot ordered to be sold to satisfy the judgment for seven thousand dollars. After the attachment had been sustained and the sale ordered,

the appellant, Adelia Schmidt, claiming an equitable lien on the lot, instituted this action, alleging that her lien existed prior to the attachment lien, and asking that the property, or its proceeds, be first applied to the payment of her debt. The lien asserted by the appellant is claimed to exist by reason of the following obligation executed prior to the issual of the attachment:

“LOUISVILLE, KY., 3 June, 1889.

“One day after date I promise to pay to Adelia Schmidt or order two thousand dollars, being money advanced to me to help pay for a house and lot on Jefferson, between Twenty-second and Twenty-third streets, and on which she holds a lien until paid; interest to be paid monthly at the rate of six per annum.

“C. E. LANDRUM AND WIFE.

“LEONE LANDRUM.”

In the petition of the appellant it is alleged that she loaned the money to be used in the purchase of the house and lot, and in consideration of the loan the defendants, Landrum and wife, agreed to give to the plaintiff a note due, as the paper above shows, and to secure the same by “mortgage on the property;” that the money was used in the purchase of the lot and a mortgage executed on the 22d of October, 1890, in accordance with the agreement, and recorded in the proper office. This mortgage was executed and recorded after the attachment had been issued and levied, and it is conceded that the mortgage created no lien or equity in favor of the appellant unless it is made to relate back to some agreement prior in date to the attachment by which the mortgage was to be executed. The only written evidence of any such agreement is the note evidencing the loan of the two thousand dol-

Schmidt v. Carter's Adm'r.

lars, in which it is recited that it is for "*money advanced to help pay for a house and lot on Jefferson, between Twenty-second and Twenty-third streets, and on which she holds a lien until paid.*" This verbiage in the note, it is claimed, creates an equity older in date than that created by the attachment, and under the familiar doctrine that in a contest between equities the elder equity must prevail, it is contended the proceeds of sale should be applied, first, to the payment of appellant's debt, the attachment lien being made to yield to the equitable mortgage lien. The statute provides: "No deed of trust or mortgage conveying a legal or equitable title to real or personal estate shall be valid against a purchaser for a valuable consideration without notice thereof, or against creditors, until such deed shall be acknowledged or proved according to law and lodged for record." (Sec. 10, chap. 24, Gen. Stats.) It is insisted that before the equity of the appellee was enforced by a sale of the property it had notice of the agreement to mortgage, and therefore the statute referred to can not affect appellant's equity.

This court has adjudged in several cases that a mortgage not recorded, or a bond for title, has precedence over a lien created by an execution or attachment where actual notice has been given the creditor before the sale under the attachment or execution, the statute being construed as meaning (and, in fact, such is its language) that the purchaser holds unless he has actual notice of the outstanding equity; and there is no reason why a creditor is not affected with notice in the same manner that a purchaser would be. The deed or mortgage unrecorded is not good against a purchaser for value *without notice*, and the decisions giving priority to unrecorded liens seem

to follow the language of the statute and carry out the legislative intent. Valid liens, however, must actually exist, and not such liens as are established alone by parol proof, or where, upon the face of the instrument, it is manifest that the lien is to be created by some subsequent agreement. Courts of equity can not be too careful in guarding the rights of *bona fide* purchasers and creditors against hidden liens, or such as exist only in the contemplation of the parties, and it should be made to appear from the terms of the instrument itself that a lien has in fact been created. A mere recital in the face of a note for borrowed money that this is a lien on the land owned by the debtor, or that the debtor will thereafter execute a mortgage, creates no lien as against third parties; and to adopt a rule that would permit such liens to be enforced against others than the parties to it, would open the door wide to fraud and destroy entirely the salutary effect of our registration laws. The parties never intended the note to evidence any lien on the property as against creditors, because it is distinctly alleged that it was agreed the debtor should thereafter execute a mortgage to secure the note, and that was in fact done, but not until the attachment lien existed.

If the recital in any note given for borrowed money or for property, that the obligee holds a lien on the property of the obligor, or that the obligor is thereafter to create a lien to secure the paper, creates an equity as against all other liens after notice, our registration laws should be dispensed with, and the priority of liens determined by the antiquity of the paper evidencing the agreement to pay.

The case of Trimble v. Puckett, &c., 93 Ky., 218, is

Schmidt v. Carter's Adm'r.

relied on as authority for the appellant. In that case Brewer, the vendee of a tract of land, owed a part of the purchase money. Puckett advanced the money, and by an agreement with Brewer, the vendee, was substituted to the rights of the vendor. The lien had not been released, but was satisfied upon the payment by Puckett and the execution of a note by Brewer to Puckett, by which Puckett was made the vendor, and the land described as "*the farm I now live on.*" Of this note and its contents the creditor had actual notice, and although unrecorded, a lien was held to exist. There was enough in that note to show the entire agreement, and the substitution of Puckett to the rights of the vendor, or, rather, Puckett was made the vendor by the contract, and of this fact the creditor had notice. It was not an agreement to create a lien, but a lien arising from the discharge of a valid lien by Puckett, and of this the creditor was fully informed before he purchased. In the one case a lien was created, and in the case before us the parties only agreed to create a lien.

Hidden liens, or such as usually arise when the debtor's property is about to pass from him, even if containing all the requisites of a mortgage, are looked upon with suspicion, and courts of equity should be reluctant to ignore the claims of *bona fide* creditors, unless such liens are clearly established. In this case there is not even a description of the property, or any of the essential elements of a mortgage, and no court of equity should hold that this note is evidence of an agreement to mortgage, or that such an agreement, if established, would supersede the rights of *bona fide* purchasers and creditors.

Judgment affirmed.

CASE 2—PETITION EQUITY—OCTOBER 10.

Northwestern Mutual Life Insurance Com-
pany v. Barbour, &c.

APPEAL FROM LOUISVILLE LAW AND EQUITY COURT.

1. A PLAINTIFF HAS THE RIGHT TO DISMISS HIS ACTION WITHOUT PREJUDICE at any time before final submission; and while the defendant can not be thereby precluded from maintaining any cause of action already pleaded as counter-claim or set-off, yet such right of the defendant exists only where the counter-claim or set-off has been filed in court while the action was pending and before the plaintiff has made a motion to dismiss it.

In this case plaintiff's motion to dismiss without prejudice was properly sustained, although after it was made, but before it was acted on, the defendant tendered an amended answer and counter-claim. And the dismissal being proper, a denial of the motion to file the amended answer and counter-claim was inevitable.

2. A RULE OF COURT REQUIRING NOTICE OF MOTIONS does not apply to a motion by plaintiff to dismiss his action, as the Civil Code makes it imperative upon the court to sustain such a motion.

BARNETT, MILLER & BARNETT FOR APPELLANT.

1. The order of March 7, 1892, dismissing the action without prejudice, after it had been reversed by this court (13 Ky. Law Rep., 619), was void as to appellant, because it was entered without notice, which the rule of court expressly requires. (Rule 4 of court; 16 Am. & Eng. Ency. of Law, 807; Varden v. Mount, 78 Ky., 86.)
2. The counter-claim, seeking a cancellation and surrender of the policy, was tendered before the motion to dismiss was properly made, and should have been filed, and the relief therein prayed for should have been granted. (Minor's Institutes, vol. 4, p. 1105; Story's Eq. Jur., sec. 700; Ward v. Deering, 4 T. B. M., 44; Leigh v. Everhart, 4 T. B. M., 379; Barnett v. Montgomery, 6 T. B. M., 330; Mershon v. Bank of the Commonwealth, 6 J. J. M., 438; Pomeroy's Eq. Jur., vol. 2, sec. 914, note; Lawson's Rights and Remedies, vol. 5, sec. 2305; Clark v. Smith, 13 Peters, 203; Conn. Mut. Life Ins. Co. v. Home Ins. Co., 17 Blatch., 142.)

DODD & DODD FOR APPELLEES.

The plaintiff can not be deprived of his right to dismiss without prejudice until a final submission of the case, or until there is either a set-off or

Northwestern Mutual Life Insurance Co. v. Barbour, &c.

counter-claim *actually asserted*. And as the motion of appellees in this case was entered seven days before there was any pretense of a set-off or counter-claim made, the dismissal was proper. (Civil Code, secs. 371, 372; *Idem*, sec. 111, subsec. 3.)

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

This action was originally brought by James P. Barbour and others against the Northwestern Mutual Life Insurance Company to recover on two policies of life insurance. And a demurrer to defendant's answer having been sustained, judgment for plaintiffs followed. But upon appeal to this court that judgment was reversed and case remanded for the demurrer to be overruled and further proceedings consistent with the opinion of this court.

It appears from transcript of the record before us that, March 7, 1892, defendant moved to file in the lower court the opinion and mandate of this court, and for both the order sustaining demurrer to the answer and judgment in favor of plaintiffs to be set aside. But that motion was not then decided, being assigned to March 15 for hearing. On the same day, March 7, plaintiffs moved to dismiss the action without prejudice, which motion was likewise postponed to March 15. In the meantime, that is, March 14, defendant moved the court to file an amended answer and counter-claim; but an order was then made postponing the action until March 15 for hearing on all pending motions, though no decision was made thereon until March 28.

No exception was or could properly be taken to filing the opinion and mandate of this court, or to setting aside the previous order and judgment as directed thereby. But the motion of plaintiffs to dismiss the action without

prejudice was at the same time sustained; while that of defendant to file an amended answer and counter-claim was overruled. And from these two orders defendant has appealed. After the motion to dismiss the action was sustained, if legally done, a denial of the motion to file the amended answer and counter-claim was inevitable, because the action had then terminated and there were no allegations to be traversed, nor any contract or transaction in litigation out of which the counter-claim could arise. Whether the motion to dismiss the action was proper, it seems to us, must depend upon construction of the Civil Code. Section 371 provides that "an action or any cause of action may be dismissed without prejudice to a future action by the plaintiff before the final submission of the case to the jury, or to the court, if the trial be by the court."

The right of a plaintiff to dismiss his action without prejudice at any time before final submission existed at common law, and a denial of it would often work hardship and injustice. We are, therefore, satisfied it was intended by the Civil Code that right might be exercised absolutely and without condition. But though such be the case it does not necessarily follow the defendant can be thereby precluded maintaining any cause of action already pleaded as counter-claim or set-off. For section 372 provides that "a defendant is entitled to a trial of a set-off or counter-claim, though the plaintiff dismiss his action or fail to appear." But clearly such right of defendant exists only where the counter-claim or set-off has been filed in court while the action was pending and before the plaintiff has made a motion to dismiss it. We are thus limited to the single inquiry whether the lower

Northwestern Mutual Life Insurance Co. v. Barbour, &c.

court correctly gave precedence to and decided the motion to dismiss before passing upon that of defendant to file the answer and counter-claim. And as to that question we see no room for doubt; for inasmuch as the right of plaintiffs to dismiss was absolute, and the court was bound to sustain the motion when made on March 7, the intervening motion of defendant to file the answer and counter-claim did not, nor could legally, deprive them of the right, or in any way affect it.

Counsel, however, contends that the motion to dismiss of March 7 was void, because made and entered without notice as required by a rule of court. It does not seem to us the rules of court, made part of the bill of exceptions, fairly construed, were intended to apply to a motion of a plaintiff to dismiss his action; for we can not conceive the necessity for, or validity of, a rule of court requiring one party to notify the other of an intended motion that the Civil Code gives the unconditional right to make and makes imperative upon the court to sustain.

In our opinion the lower court had no discretion, but was bound to dismiss the action upon motion of the plaintiffs, and, as a consequence, to overrule the subsequent motion of defendant to file the amended answer and counter-claim.

Judgment affirmed.

 Smith, by &c., v. Louisville & Nashville Railroad Company.

CASE 8—PETITION ORDINARY—OCTOBER 10.

 Smith, by &c., v. Louisville & Nashville
 Railroad Company.

APPEAL FROM FRANKLIN CIRCUIT COURT.

1. **RAILROADS—LIABILITY FOR ACT OF BRAKEMAN IN EJECTING TRESPASSER FROM TRAIN.**—A brakeman on a railroad train, as well as the conductor, is conclusively presumed to have authority to eject trespassers or intruders, and if he uses unnecessary violence in doing so the company is responsible for the injury resulting, unless the act of the servant was malicious.

In this action against a railroad company to recover for injuries alleged to have been suffered by plaintiff from being kicked by a brakeman from a moving train upon his refusal to pay his fare, the court erred in submitting to the jury the question whether "it was a part of the duty of the brakeman, under his employment as brakeman, to eject or put off the train persons who failed or refused to pay their fare," that being a question of law for the court.

2. **SAME—PLEADING.**—The fact that the act of ejection is charged in the petition to have been done willfully does not show the act to have been malicious on the servant's part, and therefore beyond the scope of his authority, as the servant is not charged with committing the act willfully, but the company is charged to have willfully done it by its agent and servant.
3. **NECESSITY FOR REPLY.**—The allegation of the answer that the plaintiff voluntarily swung himself off the train was but a denial of the averment of the petition that he was kicked off, and did not require a reply.

R. S. DINKLE FOR APPELLANT.

The brakeman was acting within the scope of his employment, and therefore the company is liable for his wrongful act. (4 Am. and Eng. Railroad Cases, 537; 1 Am. and Eng. Railroad Cases, 461; 87 N. Y., 25; 46 N. Y., 528.)

J. A. SCOTT OF COUNSEL ON SAME SIDE.

JOHN W. RODMAN FOR APPELLEE.

1. It was no part of the duty of the brakeman to eject trespassers from the train, and therefore the company is not liable. (Sherley v. Billings, 8 Bush, 151; 2 Wood's Railway Law, sec. 816, p. 1202; 2 Rorer on Railroads, pp. 1100, 1190; Towanda Coal Co. v. Heeman, 86 Pa.

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e112	932
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d115	328
e115	451
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e118	687
95	11
e122	667

Smith, by &c., v. Louisville & Nashville Railroad Company.

St., 418; Farber v. M. P. R. Co., 82 Mo. App., 378; Cox v. Keahey, 86 Ala., 340; s. c., 78 Am. Dec., 325; Wright v. Willcox, 19 Wend., 343; s. c., 57 Am. Dec., 507; Flower and Wife v. Penn. R. Co., 69 Pa. St., 210; s. c., 8 Am. Rep., 351; Marion, &c., v. C., R. I. & P. R. Co., 59 Iowa, 428; Stevenson v. Southern Pac. Co., 98 Cal., 558; s. c., 27 Am. St. Rep., 228.)

2. The allegation in the petition that the act of the brakeman was "willful" relieves the company of liability.

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

The plaintiff, a minor, suing by his next friend, alleged that while he was riding on the defendant's car from Collins Station to the city of Frankfort, and while the car was in rapid motion, "the defendant willfully, negligently and carelessly, by one of its agents and servants, to-wit, a brakeman, kicked and threw" him off of its train, thereby breaking his arm and causing him other serious injury.

The defendant denied these averments, and for a further defense alleged that the plaintiff secretly got on the rear end of one of its trains for the purpose of obtaining a free ride to Frankfort, and while so riding was discovered by its agent and servant, and thereupon voluntarily jumped off the car when in rapid motion, and whatever injury he received was caused by his own act.

The plaintiff, who was seventeen years of age and whose home was in Frankfort, testified that he had been working at Collins Station, some two miles west of the city, and, becoming sick, had gotten on the train for the purpose of stealing a ride home. That he was sitting on the platform, with his feet on the step, and was discovered by the brakeman, who demanded his fare, and upon his not having either a ticket or any money, he was told that he must get off. He replied that he would if the train would stop. The brakeman then said: "I thought I told you to get off

Smith, by &c., v. Louisville & Nashville Railroad Company.

of here," and at the same time kicked him upon the hip, which broke loose his hold on the railing, and he fell headlong on the ground, becoming unconscious, etc.

The brakeman testified that, when he discovered the plaintiff and ascertained that he had neither a ticket nor money, he told him that he must get off, when the train got to the bridge, and that before he finished the sentence the plaintiff answered that he would get off now, and swung himself off in the cut, etc. He also testified, over the objection of the plaintiff, that "he had no authority from the conductor, or in any way, to put persons off the train," and that it was not his duty to do so; but that it was his duty to look after the comfort of the passengers and to assist them in getting on and off at stations, and, in the absence of the conductor, to take up tickets and collect fares for the convenience of the conductor when he was engaged in other parts of the train. That if the plaintiff had paid him he would have handed it to the conductor, etc.

The conductor testified that the brakeman had no authority to put any one off for non-payment of fare, and he gave him no such instruction. "It is his duty," testified the conductor, "to look after the safety and comfort of passengers, to assist them on and off the train, and to assist me in ejecting an unruly passenger or one who has no right to ride, and, when I am otherwise engaged, to collect tickets and fares and give them to me," etc.

Upon this state of case, the court told the jury that if they believed from the evidence "that it was a part of the duty of the brakeman, under his employment as brakeman, to eject or put off of the train persons who failed or refused to pay their fare, and they shall further believe

Smith, by &c., v. Louisville & Nashville Railroad Company.

that the brakeman kicked plaintiff off the cars while in motion, or used unnecessary force in putting him off the car, they should find for the plaintiff such damages as he sustained thereby, not exceeding ten thousand dollars;" but that if they believed from the evidence "that the plaintiff jumped off the train, and was not kicked off by the defendant's employe, they should find for the defendant;" and lastly, that if they believed from the evidence "that the brakeman was not charged or required as part of his duty, under his employment as brakeman, to put persons off the train who had failed to pay their fare, they should find for the defendant."

The jury found for the defendant, and did so possibly because, without regard to the question of whether the brakeman kicked the plaintiff off the train, the proof submitted to them was conclusive that the brakeman had not been instructed to put persons off the train, and that such service was no part of his duty.

We are of opinion that the only question, under the pleadings and the proof, which should have been submitted to the jury, was whether the brakeman kicked the plaintiff from the train. It was admitted that the brakeman was an employe of the defendant, and that the train was in rapid motion when the plaintiff got off or was kicked off. Whether or not what the brakeman did was in the scope of his authority, or in the line of his employment, was a question of law or of mixed law and fact, to be determined by the court alone from the proof, if, indeed, that were required, and from common observation and experience, from knowledge of the nature of the business and the daily practices which obtain in its exercise. Now we know it to be held universally that

Smith, by &c., v. Louisville & Nashville Railroad Company.

the conductor, using no unnecessary force, may remove from the car persons who refuse to pay their fare, or are drunk, riotous or unruly. It is an authority conceded to him—indeed, a duty required of him; and we would refuse to hear a railroad company's effort to plead or prove that it gave no such authority to its conductors or did not charge them with such duties. And such, we believe, should be the rule with respect to brakemen. Even from the proof in this case, if we were to be so confined, we learn that he was to assist in the ejection of persons who had not the right to ride, and, upon the conductor's being engaged in another part of the train, he was to collect fares, and, necessarily, to enforce the regulations of the company to whatever extent the conductor might himself enforce them. We are so fully in accord with the view of the subject taken by the court in *Hoffman v. New York Central & Hudson River Railroad Company* (87 N. Y., 25), that we quote its language:

“It is conceded that authority in a conductor to remove a trespasser in a lawful manner, whether conferred by the rules or not, is implied, and is incident to his position. We think the same concessions must be made in respect to the authority of a brakeman, who finds a trespasser on the platform of a car. His duties do not primarily pertain to the protection of the cars against intruders; but he is a servant of the company, on the train, concerned in its management, and fully cognizant of the obvious fact that intruders who jump upon the trains for a ride, without intention of becoming passengers, are wrongfully there. Suppose a train was standing still and a trespasser was put off by force by a brakeman, using no unnecessary violence, would it not be a good defense to an action

Smith, by &c., v. Louisville & Nashville Railroad Company.

against him for the assault that he was brakeman, and did the act complained of in that capacity, although without express authority? The implied authority in such a case is an inference from the nature of the business, and its actual daily exercise, according to common observation and experience. But, assuming authority in the conductor or brakeman to remove a trespasser in a lawful manner, the question remains whether, when a conductor or brakeman, without warning or notice of any kind, kicks a boy of eight years from the platform of a car while the train is running at a speed of ten miles an hour, he can be said to be acting within the scope of his employment, so as to make the company liable for the act. Assuming the case made by the plaintiff, the act was flagrant, reckless and illegal; but the point is, was the act within the scope of the employment and authority? . . . In this case the authority to remove the plaintiff from the car was vested in the defendant's servants. The wrong consisted in the time and mode of exercising it." And the company was held responsible. (Same case reported in 41 Am. Rep., 337.)

In this case the brakeman sought to collect the fare from the plaintiff—not for himself, but for the company. Upon his failure to pay, he sought to eject him from the car, not to accomplish his own ends, but to subserve the interests of the company. The company, it is true, owed the plaintiff no duty arising out of a contract to carry him or to protect him; nevertheless, it might not violate the common instincts of humanity or treat the plaintiff brutally in its process of ejecting him from the car. Undoubtedly when the object of the servant—the end sought to be reached by him—is the intentional or

Smith, by &c., v. Louisville & Nashville Railroad Company.

malicious infliction of an injury upon the person of the trespasser, the company is not liable for his act, and the existence of malice or intentional and willful design is a question of fact to be ascertained from all the circumstances of the case. If the end sought by the employe was the infliction of an injury; if the purpose he had in view when he kicked the plaintiff off the train, if he did kick him off, was to injure him, then the company is not liable, because the act would be malicious and willful. But if the end sought was the ejection of the intruder, if his purpose was devoid of evil design and merely to protect the interest of his employer, then, however careless or reckless the means employed, the company is liable.

The case cited by counsel for the appellee, and said to be directly in point, illustrates the distinction. The plaintiff, a boy, and a trespasser, was driven off the train by a brakeman, who threw coal at him so as to cut and blind him and cause him to slip and fall on the track, whereby he was injured. The company was held not to be liable (*Towanda Coal Company v. Heeman*, 86 Pa. St. Rep., 418.) So this court, in the case of *Winnegar's Administrator v. Central Passenger Railway Company*, 85 Ky., 547, said: "If one driving the cars for the corporation should leave the car and beat or abuse one on the sidewalk, the company would not be responsible."

The principle involved and stated by this court in *Sherley, &c., v. Billings*, 8 Bush, 147, in this language, that "if the servant goes beyond the scope of his employment he is as much a stranger to his master as to any third person, and his acts can in no sense be regarded as the acts of his master," is easy of announcement, but

Smith, by &c., v. Louisville & Nashville Railroad Company.

sometimes difficult of application. In all cases where unnecessary force is used it may be said that the servant acted without authority, express or implied. It can truthfully be claimed in all cases and by all companies that the authority of their servants is limited to the exercise only of force sufficient to eject a trespasser or passenger in a lawful manner.

Nevertheless, the company is liable if the servant, in the exercise of his authority, within the general scope of his employment and in the line of his duty, use unnecessary force, or use it under circumstances, or at a time, when the consequences ordinarily would be seriously injurious to the person ejected.

In this case it does not matter that the act of ejection is charged in the petition as having been done willfully, as well as negligently and carelessly. The willfulness is charged against the defendant company, and for this reason it can not be said that the use of the term willful in itself shows the act to have been malicious on the servant's part, and therefore beyond the scope of his authority. The servant is not charged with committing the act willfully, but the company is charged to have willfully done it by its agent and servant.

The allegation of the answer, that the plaintiff voluntarily swung himself off the train, is not such an affirmative averment as required a reply. The simple issue was presented whether or not the brakeman kicked him off. The statement that he swung himself off is merely in emphasis of the denial that he was kicked off. It is mere surplusage, and, at any rate, is in direct conflict with the averment of the petition that the plaintiff was kicked off, and is, in substance, a denial of that averment. We are

Davis v. Commonwealth.

of opinion that the only issues to be submitted to the jury in this case are whether or not the brakeman kicked the plaintiff off of the car, as testified to by the plaintiff, and whether he did so with or without malice or evil design, as indicated above; and upon the determination of these issues depends the question of the company's responsibility for the plaintiff's injury.

Judgment reversed, with directions to proceed as indicated by this opinion.

CASE 4—INDICTMENT—OCTOBER 12.

Davis v. Commonwealth.

APPEAL FROM LAWRENCE CIRCUIT COURT.

1. **DYING DECLARATIONS.**—Upon a trial for murder it was not competent for defendant to prove that another person had made a dying confession that he and not the accused killed the deceased.
2. **SAME.**—The statement of a dying person is competent as his dying declaration only when it relates to the manner and circumstances of the infliction upon him by another of personal injuries resulting in his death.
3. **IMPEACHMENT OF WITNESS.**—The fact that a witness is sworn and testifies entitles the adverse party to impeach his general reputation for truth without reference to the materiality of his evidence.
4. **SAME.**—It was competent to prove the bad reputation of a witness two years before the trial for the purpose of throwing light upon his reputation at the time of the trial.

RIFFE, SKAGGS, R. T. BURNS AND STEWART & STEWART FOR APPELLANT.

1. Any testimony tending to show that a person other than the accused committed the crime is competent. Therefore the dying confession of Granville Pearl should have been admitted.
2. It was error to allow the Commonwealth to impeach the defendant's witnesses by showing their reputation three or four years before the trial.

Davis v. Commonwealth.

WM. J. HENDRICK, ATTORNEY-GENERAL, FOR APPELLEE.

1. An admission or confession to be competent as evidence must be that of a party in interest or of a party accused of crime. (Stephen's Digest of Evidence, part 1, chap. 4, arts. 20, 21, 22; 1 Greenleaf on Evidence, sec. 283.)
2. A dying declaration must be the declaration of the accused, not of a third party. (United States v. Gooding, 12 Wheat.; The American Fur Co. v. United States, 2 Peters, 358; Commonwealth v. Eberle, 8 S. & R., 9.)

CHIEF JUSTICE BENNETT DELIVERED THE OPINION OF THE COURT.

The appellant having been convicted of the crime of murdering Viona Pack by the Lawrence Circuit Court, he appeals and complains as follows: First, that the court erred in not allowing him to prove by G. W. Miller that Granville Pearl confessed to him on his death-bed that he, Pearl, killed Viona Pack. It seems to us that admissions and confessions as to competency stand upon the same footing. Admissions can not be used in evidence, except against the person making them in an issue between him and another person, wherein the truth of the admissions is involved, or against his privies claiming through him. And confessions are incompetent evidence except against a person charged with crime, or, in a proper state of case, against his confederates. Nor is the proposed evidence competent as a dying declaration, because such evidence is only competent when it comes from a declarant whose personal injuries by another have resulted in death, and the declarations must be confined to the manner and circumstances of the injury and to the person that did it.

Second, in allowing evidence to go to the jury, impeaching witnesses who had testified for the appellant, but who had not testified to any material fact for the

Davis v. Commonwealth.

appellant, the material fact which the appellant desired to prove by them having been excluded by the court. It seems to us that the fact that the witness is sworn and testifies entitles the adversary to impeach his general reputation for truth, without reference to the materiality of his evidence; otherwise, there would be constant strife and litigation over the question as to the materiality of the witnesses' evidence in order to determine whether or not the impeaching evidence was admissible.

Third, it is contended that evidence of the bad character of a witness, sought to be impeached, two years before the time that he testified, is incompetent. It is true that the character of a witness at the time he testifies is in issue before the court or jury, but it is equally true that his reputation before then may be inquired into in order to throw light upon his reputation at the time he testifies.

There is no doubt that Viona Pack was assassinated, and we think that the evidence authorized the jury to believe beyond a reasonable doubt that the appellant was the guilty party. The court committed no error.

The judgment is affirmed.

Cockrill v. Commonwealth.

CASE 5--INDICTMENT--OCTOBER 12.

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Cockrill v. Commonwealth.

APPEAL FROM ESTILL CIRCUIT COURT.

1. **INSTRUCTIONS AS TO SELF-DEFENSE.**—Upon the trial of appellant for murder the court erred in instructing the jury that they might acquit “if they believed from the evidence that at the time he did the shooting (if he did do it) he was in immediate danger of death or great bodily harm then about to be inflicted on him, or which reasonably appeared to him about to be inflicted on him, by deceased, and from which he had no other safe, or to him apparently safe, means of escape.” This instruction required the jury to believe the danger to have been real before they could acquit, without regard to the defendant’s reasonable belief as to the existence of the danger.
2. **SAME.**—The defendant, who had been summoned to aid a deputy sheriff in arresting an offender, having been driven from the ground at the point of a knife by the deceased, who was a friend of the resisting prisoner, had the right to return, and having done so, it was error for the court to instruct the jury that it was his duty to escape impending danger by flight. And it was also error, under the circumstances, to give an instruction denying defendant the right to act in his self-defense if he voluntarily returned and renewed the difficulty, unless after such return he abandoned said difficulty in good faith before the shooting of deceased.
3. **SAME.**—Even if an instruction based upon defendant’s return and renewal of the difficulty was authorized, it was error to require the jury to believe, “beyond a reasonable doubt,” that defendant had abandoned the difficulty, as this was to require him to establish his innocence beyond a reasonable doubt.
4. **SAME.**—An instruction denying a defendant the right to act in his self-defense if he had “other safe, or to him apparently safe, means of escape,” is objectionable, for the reason that it might be construed to mean that the defendant must seek to escape by means not absolutely safe, but merely apparently so.

GEORGE DENNY, JR., ROBERT RIDDELL AND JOHN BENNETT
FOR APPELLANT.

1. Instruction 3 is erroneous in that it excludes entirely from the consideration of the jury what appellant might have believed as to the danger or the reasonableness of that belief, and also in that it requires the jury, in order to acquit on the ground of self-defense, to believe that there was “no other safe, or apparently safe, means of escape.”

Cockrill v. Commonwealth.

2. Instruction 4 seems to assume that if appellant returned and renewed the difficulty, he is cut off from all right of self-defense, even if the deceased used more force than was necessary in repelling appellant's assault. This is not the law. (*Terrell v. Commonwealth*, 18 Bush, 246; 2 Bishop's Crim. Law, sec. 571.)

No such instruction should have been given, but even if some instruction embodying that idea was proper, the verbiage of the one given was misleading.

WM. J. HENDRICK, ATTORNEY-GENERAL, FOR APPELLEE.

The instructions state clearly the law of self-defense as applicable to the facts of this case. (*Terrell v. Commonwealth*, 18 Bush, 246; *Holliday v. Commonwealth*, 11 Bush, 850; *Luby v. Commonwealth*, 12 Bush, 7; *Phillips v. Commonwealth*, 2 Duv., 828; *Bohannon v. Commonwealth*, 8 Bush, 482.)

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

Upon his fourth trial under an indictment for the murder of James Amerine in Estill county, in November, 1887, the appellant was found guilty of manslaughter, and sentenced to confinement in the penitentiary for the term of four years.

He insists that his conviction was at last secured by reason of the misinstruction of the jury by the trial court, the misconduct of the prosecuting attorney in his speech to the jury, and the misconduct of certain members of the jury during the trial.

Stated briefly, the Commonwealth's proof established that after a hasty controversy with the deceased in the court-house yard in the town of Irvine, the appellant rapidly left the yard, and procuring a gun from a neighboring house came back hurriedly, approached his antagonist, and, after deliberate aim, fired the fatal shot. The facts and circumstances attending the killing, and relied on by the appellant as showing the homicide to have been excusable, and as establishing a case of self-defense on

his part, are about these: It was county court day, and late in the evening a row was in progress in a saloon. The deputy sheriff was sent for to quell the disturbance. He succeeded in arresting one Puckett, who was drunk and disorderly, and while attempting to take him to jail was resisted and assailed by a large number of the excited and drunken friends of the prisoner. Among these latter the deceased, Amerine, was one of the most active and unruly. He swore that Puckett should not be taken; he cut at the deputy with a knife, which he flourished in his hand from the inception of the trouble until he was killed.

The deputy was sorely pressed, and summoned as his aids in suppressing the mob and in landing the prisoner in jail the appellant Cockrill, Butterworth and, perhaps, others. The officers with the prisoner and the crowd had surged across the street and into the court-house yard. The deputy was thrown to the ground, and his nephew, young Park, a lad of some sixteen years, was pushing through the mass of yelling men toward his uncle, when he was roughly accosted by the deceased, knife in hand; and while the boy was crying, the appellant, seeing his danger, said to Amerine, "Don't hurt him," or "Jim, don't hurt him, he is nothing but a boy."

The deceased turned upon the appellant, saying, "What in the hell have you got to do with it?" And when assured that no offense was intended, he advanced on the appellant, who backed away, protesting all the time that he had nothing against him, until, reaching the yard gate, he sprang through it, followed by the angry and insulting words of his assailant. Amerine then proceeded toward the front of the court-house, and flourishing his

knife, said, "he would sink that in him." Cockrill procured a gun, walked up the pavement toward the still struggling, resisting crowd and Amerine. He stops, levels his gun at Amerine, taking deliberate aim; there is nothing in the way of the expected shot. Suddenly he voluntarily takes down his gun, lowering the breech and extending the muzzle upward; the expected report is not heard, and the trouble between them is supposed to be over. But Richardson and Wilson, having seen the appellant's hurried return with the gun and his approach toward Amerine, rush on him, and when they reach him, seize him and hold him and his gun "as in a vise." Amerine, who was only a few steps away, seeing the situation of the appellant, stooped forward, and with his left hand extended as if to grab the muzzle of the gun, and with his right hand grasping the open knife, made at the appellant. The latter seeing his danger, with an extraordinary effort pressed down the gun and fired from his hip, calling on the persons holding him not to let the deceased cut him. This is the defendant's side of the case, and there is much proof to sustain this account of it. On the important point that the appellant was summoned as an aid to the deputy sheriff, there is no contradiction. The court gave the usual instructions on the subject of murder and manslaughter.

By a third instruction the jury were told that they might acquit the defendant "if they believed from the evidence that at the time he did the shooting (if he did do it) he, defendant, *was in immediate danger of death or great bodily harm* then about to be inflicted on him, or which reasonably appeared to him about to be inflicted

upon him, by said Amerine, *and from which he had no other safe, or to him apparently safe, means of escape.*"

Here the right of the defendant to strike in defense of his life or person is made to depend not on his own reasonable belief that he was in immediate danger of death or great bodily harm, but on the belief of the jury that such danger actually existed. It is true that the immediate infliction of the danger need only to have been reasonably apparent to the defendant, nevertheless, the jury, under this instruction, must believe the danger to have been *real* before they could acquit. This instruction has often been condemned as highly prejudicial to the substantial rights of persons charged with homicide and who seek to excuse the act—and the law does excuse it—upon the ground that the danger was *apparent* and not necessarily real. Moreover, notwithstanding that the danger must be so established to the satisfaction of the jury, as in fact *existing*, and as being about to be inflicted on him, yet he may not still act if perchance he may seek some other safe, or to him *apparently* safe, means of escape.

Does this mean that the defendant must seek to escape by means not absolutely safe, but merely *apparently* so? The language is easily susceptible of this construction. But, upon broader grounds, the requirement of the instruction that the defendant must seek safety, flight or means other than by defending himself from the impending danger, and that, too, by such active and aggressive resistance as may appear sufficient to safely protect himself from the attack made on him, must be condemned. Assuming the case as made out for the defendant by the proof, and we must so assume in fitting or applying the

law of self-defense to the particular facts shown in support of his proffered excuse for the homicide, he was upon the ground as an appointed aid to the deputy sheriff. When driven off the grounds at the point of the knife by the unruly assistant of the resisting prisoner, to arrest and imprison whom he was summoned by the officer, shall the defendant fail or refuse to return, or, returning, shall he be required to escape impending danger by flight? Not even the rigid requirements of the common law would demand this of him.

The fourth instruction was as follows: "If the jury believe from the evidence beyond a reasonable doubt that the defendant, after engaging in the difficulty in which Amerine was killed, left the place of said difficulty, and that afterward, at a time when he was in no danger and away from said Amerine, he voluntarily returned to the place where Amerine was, and of his own volition and choice renewed said difficulty with deceased, then, and in that event, he can not rely upon the law of self-defense and apparent necessity, unless after such return he abandoned said difficulty in good faith before the shooting of Amerine."

For the reasons already indicated explanatory of the right of the defendant to return to the grounds from which he had been driven, it is obvious that that leaving and returning should not form the basis of an instruction depriving him of the right of self-defense. But if the defendant had not been summoned to aid the deputy, the instruction is erroneous.

There are three things charged, the doing of which by the defendant are made the basis of a denial to him of the

right to defend himself, and one upon which that right is regained.

First, that he *left* the difficulty; second, that he *returned* to it; third, that he *renewed* it; and fourth, that he *abandoned* it. Now, all four of these propositions are preceded by the requirement of a belief on the part of the jury *beyond a reasonable doubt*. The first three are facts material and necessary to constitute the guilt of the defendant. The last one is a condition upon which he may establish his innocence. And to require the jury to believe it as indicated in the instruction is to require the defendant to establish his innocence beyond a reasonable doubt.

Upon the whole, we do not know of a case in which the usual instructions as to murder, manslaughter and unrestricted self-defense could more appropriately be applied as the whole law of the case, with perhaps an additional instruction on the duty of the defendant to aid the deputy in arresting and imprisoning disorderly persons and remain on the ground for that purpose.

This, however, if given, should be qualified so as not to afford the defendant a cloak to shield any wrong-doing of his own. It is improbable that the minor errors complained of can occur again, and are therefore not noticed.

Let the judgment be reversed and new trial be had according to the principles of this opinion.

Doolin, &c., v. Commonwealth.

CASE 6—INDICTMENT—OCTOBER 14.

Doolin, &c., v. Commonwealth.

APPEAL FROM PULASKI CIRCUIT COURT.

1. **SELF-DEFENSE.**—One who is charged with murder may be excusable upon the ground of self-defense, although the deceased might, if he had taken the life of the accused, have also been excusable upon the same ground, as each might have been mistaken as to the purpose of the other.
2. **SAME.**—While an officer has no right to shoot in order to stop the flight of one who was fleeing to escape arrest for a mere breach of the peace, yet if he had reasonable ground to believe that he was in danger of losing his life or suffering great bodily harm at the hands of the person he was seeking to arrest, he had the right to shoot in his self-defense. And this is true, although the fleeing offender had reason to believe from the cries of the crowd and from the fact of the officer pursuing him with a gun that the officer was about to shoot him, and was attempting to protect himself from the supposed danger at the time he was wounded by the officer. It was, therefore, error to instruct the jury that if defendant in pursuit of deceased gave him reasonable ground to believe, and deceased did believe, that it was the purpose of defendant to take his life or do him great bodily harm, and in an attempt to protect himself from such danger he did endanger the life of defendant, and defendant shot to protect himself from danger brought on by his own conduct in endangering the life of deceased, he could not be excused on the ground of self-defense.

W. O. BRADLEY, G. W. SHADOAN, AND W. A. MORROW FOR
APPELLANTS.

1. The alleged dying declaration was incompetent as evidence because it did not appear that it was made under a sense of impending death (Vaughn v. Commonwealth, 86 Ky., 434; Bales v. Commonwealth, 14 Ky. Law Rep., 178.)
2. That portion of the declaration reciting matters not connected with the immediate circumstances attending the killing was clearly incompetent, even if the circumstances under which the declaration was made were such as to render the other parts of it competent. (Terrell v. Commonwealth, 13 Bush, 259.)
3. The court erred in giving and refusing instructions. (Criminal Code, sec. 394; Dilger v. Commonwealth, 88 Ky., 555.)

W. J. HENDRICK, ATTORNEY-GENERAL, FOR APPELLEE.

95	29
124	42
95	29
125	140

Doolin, &c., v. Commonwealth.

CHIEF JUSTICE BENNETT DELIVERED THE OPINION OF THE COURT.

As the case must go back for another trial, no facts will be noticed in the opinion further than is necessary to make it intelligible. There was a Sunday-school meeting held at Oak Grove meeting-house, and during the meeting Watson and Gastineau fired their pistols within a short distance of the meeting-house, which created a disturbance. The minister requested the appellant Doolin, who was a constable in good standing, to arrest the persons creating the disturbance; and in obedience to the request he, together with Cope, who was summoned to assist, started out to make the arrest. Apprehending some trouble, they procured a rifle gun, and finally they overtook Watson and Gastineau, and ordered them under arrest. Gastineau obeyed, but Watson moved on, not obeying, and he finally began to run, and the appellants pursuing, Doolin being armed with the rifle gun and Cope with a stick. The witnesses for the Commonwealth say that Cope said to Doolin, "Shoot him, shoot him, I say, and don't let him get away," and immediately Doolin fired the gun, and Watson fell wounded, from which he died.

The evidence for the appellants is, that Cope did not say "shoot him," etc., but that while they were pursuing Watson in order to arrest him, and telling him that they did not wish to hurt him, but only to arrest him, he said that if they followed him any further he would shoot them, and threw his pistol over his shoulder in the direction of them and snapped it at them; and that believing the pistol was loaded, and that Watson intended to kill them, Doolin fired in their necessary self-defense. The court instructed the jury that the appellants had the right to

pursue and arrest Watson without a warrant, the offense having been committed in the hearing of Doolin; but the offense being only a breach of the peace, Doolin had no right to shoot Watson in order to compel him to stop his flight, and that if he, Doolin, did so shoot, they must find him guilty; but if Watson snapped his pistol at Doolin as if to shoot him in order to prevent the arrest, and that Doolin believed that his life was in immediate danger at the hands of Watson, then he had the right to shoot Watson in his own defense. But the court gave this other instruction: "If Doolin in pursuit of Watson gave him reasonable ground to believe, and he did believe, that it was the purpose of Doolin to take his, Watson's, life, or do him great bodily harm, then he had a right to protect himself from such danger, and take the life of Doolin; and in an attempt to protect himself from such danger he did endanger the life of Doolin, and Doolin shot to protect himself from danger brought on by his own conduct in endangering the life of Watson, he can not be excused on the grounds of self-defense."

It seems to us that this instruction is erroneous, for its meaning is that if Doolin in the pursuit of Watson gave him reasonable ground to believe that he, Doolin, intended to take his life or to do him great bodily harm, and he tried to shoot Doolin in order to prevent the apprehended danger to himself, which might not have existed in fact, then Doolin could not avail himself of Watson's threatening conduct toward him as a ground of self-defense. If Watson had shot Doolin, and was on trial for the shooting, the circumstances indicated in the instruction would avail him as self-defense. Under the plea of self-defense it is not necessary that the apprehended danger should exist

Doolin, &c., v. Commonwealth.

in fact; but if the facts and circumstances are such as to give the party a reasonable ground to believe, and he does believe, in the existence of such danger, then he may act in his own defense, although the danger does not exist in fact. Hence it may sometimes occur that each party may be mistaken as to the existence of danger, and both be entitled to the law of self-defense, as this case illustrates; for Watson might have been induced to believe from the fact that Doolin was armed and pursuing him, and the shouts, "shoot him," that Doolin's purpose was to shoot him, and therefore he would have acted in self-defense, and Doolin not intending to shoot Watson, but to pursue and arrest him, as he had the right to do, might have believed that Watson intended to shoot him to prevent being arrested, and shot to protect himself. So in such case each would be mistaken as to the purpose of the other, and each might be excusable on the ground of self-defense. No instruction should have been given on that subject.

For the error indicated the judgment is reversed and the case is remanded for a new trial.

Haverly v. Commonwealth.

CASE 7—INDICTMENT—OCTOBER 17.

Haverly v. Commonwealth.

APPEAL FROM HARRISON CIRCUIT COURT.

(INSTRUCTION AS TO SELF-DEFENSE.—Although it appeared upon the trial of appellant for murder that the deceased had threatened to take his life, had shoved him off the sidewalk in passing him on the street, and on one occasion had put his hand in his pocket as though to draw a weapon, when the defendant got behind a tree, the defendant was not entitled to an instruction telling the jury in substance that if these things were true the defendant had reasonable grounds to believe that the mere presence of the deceased put him in peril, and that he was not bound to wait until he was actually assaulted before acting in his self-defense. It is only where the previous assault manifests a deadly intent that such an instruction is authorized.

WARD & LAFFERTY FOR APPELLANT.

1. The court erred in its instructions in excluding from the consideration of the jury all previous acts of hostility by the deceased toward the accused. (*Bohannon v. Commonwealth*, 8 Bush, 481; *Oder v. Commonwealth*, 80 Ky., 82.)
2. It was error to submit the case to the jury in the absence of counsel for the accused, the failure to send for counsel resulting in the failure to have the jury take with them to their room one of the depositions and also the weapons in evidence. (*Crim. Code*, sec. 248; *Allen v. Commonwealth*, 85 Ky., 642; *Temple v. Commonwealth*, 14 Bush, 769.)
3. The action of the sheriff in shutting himself up with the jury while they were deliberating was improper, and entitles appellant to a reversal. (*Shields v. Commonwealth*, 2 Bush, 81.)

WM. J. HENDRICK, ATTORNEY-GENERAL, FOR APPELLEE.

The law of the case was fully given for the defendant, and the only error of the court was in refusing to give the instruction offered by the Commonwealth. That a person has been merely threatened, even by a most lawless character, furnishes no excuse for taking his life. (*Oder v. Commonwealth*, 80 Ky., 82.)

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

Under an indictment for the murder of Lewis Long, the appellant was convicted of the crime of manslaughter

95	33
100	650
95	33
125	700

Haverly v. Commonwealth.

and sentenced to confinement in the penitentiary for the term of two years. He complains of various errors, and his motion for a new trial having been overruled, he has appealed to this court.

It is contended by his counsel that the facts leading up to the killing are of such a character as authorized or rather required the lower court to give to the jury instructions similar in character to those given in the Bohannon case, 8 Bush, 481, and in the Oder case, 80 Ky., 32. In the first-named case it is recited that Bohannon's life had been repeatedly and openly threatened by a desperate and lawless enemy, and who had in fact made an actual attempt to assassinate him upon the public highway with a deadly weapon, and the accused had escaped death only by deserting his horse and concealing himself in the fields. After which the deceased pursued the friends of the accused riding with him and who were members of his family residing at his house, and mistreated them, and declared to them that he intended to kill Bohannon on sight. Under these circumstances it is said of Bohannon, "He may leave his home for the transaction of his legitimate business, or for any lawful and proper purpose, and if on such an occasion he casually meets his enemy, having reason to believe him to be armed and ready to execute his murderous intentions, and he does believe, and from the threats, the previous assault, the character of the man and the circumstances attending the meeting he has the right to believe, that the presence of his adversary puts his life in imminent peril, and that he can secure his personal safety in no other way than to kill him, he is not obliged to wait until he is actually assailed." But it is said further, "that the threats of

Haverly v. Commonwealth.

even a desperate and lawless man do not and ought not to authorize the person threatened to take his life; nor does any demonstration of hostility short of a manifest attempt to commit a felony justify a measure so extreme."

In the second-named case, Hall, having a grievous charge against Oder connected with his daughter, threatened to kill him, waylaid him several times, assaulted him with a pistol, and sought to hire for money an ex-convict to kill him. The court said "that when a person has been merely threatened by even the most lawless character, it furnishes no legal excuse for taking his life. But when a person has been threatened, waylaid, menaced and assaulted with a deadly weapon, and he afterwards casually meets his foe, if from his character, antecedent conduct and the circumstances of the meeting and his presence, he believes and has reasonable grounds to believe, judging thereof for himself, but at his peril, that his foe is about to inflict on him loss of life or great bodily harm, or will then and there carry into execution his design to kill him or do him such harm, unless prevented, he is not bound to wait until actually assaulted, but he may lawfully use such force as shall be necessary to avert such impending danger."

In these two cases, which are extreme instances of vindictive bloodthirstiness on the part of the persons killed, it will be seen that the very presence of their enemy put into actual and imminent peril the lives of the accused persons, and gave them reasonable grounds to believe that further murderous assaults with a deadly weapon were about to be made on them.

After a careful reading of the record before us we are of opinion that the facts of this case fall short of author-

Haverly v. Commonwealth.

izing an instruction similar to those given in the cases relied on.

The appellant and the deceased had been fellow-workmen in the same shop. The deceased was overbearing toward his comrades, and would put "bucks" or stitching horses in the way leading to the appellant's bench. He took off his pistol in the presence of the workmen and placed it in his work drawer. He rendered himself unpopular with the workmen, and was put to work at his residence by the proprietor. Shortly before the killing he threatened to "do up" or "fix" the defendant, and on several occasions, when passing him on the streets of the town, he would crowd against him and shove him off the pavement; on one such occasion he put his hand in his pocket as if to draw a weapon, and the accused got behind a tree. These were assaults, contend counsel; and so they were, but we can not say that any deadly intent is apparent. No hostile demonstration manifesting an attempt to commit a felony is so clearly evidenced by these exasperating intimidations as to require their submission to a jury in an instruction.

These circumstances and threats, this display of the pistol and—adopting the language of this court in *Kennedy v. Commonwealth*, 14 Bush, 352—"any other fact tending to show that the slayer was in peril at the time of the homicide, or that he had reasonable grounds upon which to believe he was in such peril, *may all be given in evidence* for the purpose of showing that there were grounds to believe he was *then* in danger; but if, notwithstanding all these things, he had no reasonable grounds for believing he was then in danger, they will not excuse him on the ground of self-defense, although they

Haverly v. Commonwealth.

may have justified him in believing he would be in such danger at some future time. This is in consonance with the philosophy of the law of self-defense, which is based on necessity, real or apparent. When there is no necessity, or apparent necessity, to slay an adversary to save one's own life, or person from great harm, there can not, in the nature of things, be a right to kill in self-defense."

The usual instructions on the subject of murder and manslaughter were given, and by the third the jury were told that "if they believed from the evidence that the accused, at the time of the shooting, in good faith believed, and had reasonable grounds to believe, that he was in immediate danger of loss of life or of suffering great bodily harm at the hands of Lewis Long, then he, the accused, had the right to use such means as were necessary, or apparently necessary, to protect himself from such impending danger, and if in so doing he shot and killed Lewis Long he, the accused, is excusable and should be acquitted." This instruction is unobjectionable, and embraces the law of self-defense as applicable to this case.

To the complaints made that the court permitted the jury to retire to their room in the absence of the defendant's counsel, without taking with them certain papers and without the knife and pistol of the deceased, and that while consulting in their room the sheriff went in to them and shut himself in with them, it is sufficient to say that the circumstances indicated only appeared in the motion and grounds for a new trial. They are not shown to have in fact occurred.

We have examined the objections taken with regard to the exclusion and admission of testimony, and perceive no

Commonwealth v. Murphy.

error in anyway affecting the substantial rights of the accused.

We have not deemed it necessary to review the facts immediately attending the homicide. From the testimony of the accused and the declaration of the deceased, made just after the shooting, that he "rushed at" the accused before the latter fired a shot, from the range of the ball in the neck showing the deceased to have "ducked" his head as if rushing on the accused, and from the hostile intentions of the deceased gathered from his previous conduct, it would seem that a case of self-defense had been made out, but of the truth of this testimony and of the weight to be given it the jury must be left to judge.

Perceiving no error of law, we must affirm the judgment.

CASE 8—INDICTMENT—OCTOBER 19.

Commonwealth v. Murphy.

APPEAL FROM MARION CIRCUIT COURT.

SALE OF LIQUOR ON ELECTION DAY.—As the fraction of a day is not regarded in law, the sale or gift of spiritous, vinous or malt liquors at any time during the twenty-four hours of an election day must be held a violation of section 154 of the Constitution, which requires the General Assembly to prescribe such laws as may be necessary for the restriction of the sale or gift of spiritous, vinous or malt liquors "on election days," as well as of the statute enacted in pursuance thereof, which prohibits the sale or gift of such liquors "upon the day" of any general or primary election.

WM. J. HENDRICK, ATTORNEY-GENERAL, FOR APPELLEE.

In the absence of any qualification the legal day means from twelve o'clock midnight until twelve o'clock midnight. There are no fractions of a day

96	38
126	107

Commonwealth v. Murphy.

in the law. (Sec. 10 of art. 13, Election Law, Acts 1891-92-93, p. 168.)

WM. E. & S. A. RUSSELL FOR APPELLEE.

1. The statute forbidding the selling or giving of liquor on election day is unconstitutional, as under it liquor can not be used on that day for medicinal or sacramental purposes.
2. Election day ends at four P. M., and after that hour liquor may be sold without violating the election law. A calendar day was not in the contemplation of the framers of the Constitution or of the Legislature (Con. of Ky., secs. 148, 154; sec. 10 of art. 13, Election Law.)

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

G. W. Murphy, now appellee, was indicted for violation of section 10, article 13, of chapter on Elections, Acts of 1891-92-93 (Kentucky Statutes, sec. 1575), which is as follows: "Whoever sells, loans, gives or furnishes to any person or persons, either directly or indirectly, spirituous, vinous or malt liquors, or any other intoxicating drink, in any precinct, town, city or county of this Commonwealth upon the day of any general or primary election therein, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined the sum of not less than twenty-five nor more than fifty dollars for each offense, which may be recovered by proceedings in any court of competent jurisdiction, or by indictment in the circuit court. It shall be the duty of the circuit judges throughout the Commonwealth to make special mention of this section in charge to the grand juries of said courts."

The evidence on trial of defendant showed that *between nine and ten o'clock p. m.*, November 8, 1892, being day of the presidential election, he gave a drink of whisky to a person, and thereupon the court instructed the jury to find for him, which was done. So that the only question on this appeal by the Commonwealth is whether the gift

of liquor, as proved, was made in terms and meaning of of the statute upon the *day* of a general election.

Section 148 of the Constitution provides that "all elections by the people shall be between the hours of six o'clock A. M. and seven o'clock P. M., but the General Assembly may change said hours," which has been done, and four o'clock P. M. is the time prescribed by statute when voting on an election day shall cease.

Section 154 made it the duty of "the General Assembly to prescribe such laws as may be necessary for the restriction or prohibition of the sale or gift of spiritous, vinous or malt liquors *on election days*."

An election day, or the day of any general or primary election, would, in legal contemplation, mean twenty-four hours, including the period during which the election is actually held; for it is a maxim applicable to every transaction or occurrence that the fraction of a day is not regarded in law. And, consequently, the sale or gift of spiritous, vinous or malt liquors at any time during the twenty-four hours of an election day must be held an infraction of section 154 of the Constitution, as well as of the statute enacted in pursuance of it, unless we assume, contrary to the language used, and without reason, that it was intended such sale or gift might be made with impunity up to a moment before beginning of the voting, though the people had assembled for the purpose, and immediately after close of the polls, though a crowd still remained on the ground.

The objection to the statute, that it prohibits the sale or gift of liquor for medicinal or sacramental purposes, even if well founded, can not be relied on or avail defend-

Vance v. Louisville Courier-Journal Co.

ant Murphy, as it is apparent he had neither purpose in view.

In our opinion it was error to give the peremptory instruction mentioned; and the judgment is reversed and cause remanded for proceedings consistent with this opinion.

CASE 9—PETITION ORDINARY—OCTOBER 21.

Vance v. Louisville Courier-Journal Co.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

1. **LIBEL.**—ANIMADVERSION UPON THE CONDUCT OF A PUBLIC OFFICER, however severe, is not libelous if it be confined within the limits of fair and reasonable criticism and based on facts.

In this action to recover damages for a newspaper publication 'criticising the plaintiff's conduct as election supervisor, the court properly instructed the jury "that if they believed the statements contained in the publication were substantially true as published, or were reasonable and fair criticisms of the acts and conduct of the plaintiff as supervisor, and were made in good faith without malice, then they should find for the defendant."

2. **SAME.**—The jury were the judges of the reasonableness of the grounds upon which the newspaper charges were based. And the evidence was sufficient to authorize the jury to find that there were reasonable grounds upon which to base the charge, in the publication complained of, that plaintiff, a Republican supervisor, had in every way interfered with the polling of Democratic votes, and that he would be arrested on the charge of bribery.
3. **SAME.**—As plaintiff, as supervisor, upon seeing persons go in and out of a room with his opposing workers, interfered with the freedom of their action upon the belief that it was evidence of bribery, he can not complain if his activity exercised in the same manner be taken as evidence of the same offense.

W. W. THUM FOR APPELLANT.

1. The publication complained of is plain and unambiguous in its terms; therefore the question as to whether the charge is bribery or not is a matter for the court and not for the jury to determine. (2 Thompson

95	41
99	481
96	41
118	660

Vance v. Louisville Courier-Journal Co.

- on Trials, sec. 2029, ed. 1889; Townsend on Slander and Libel, pp. 502-4, ed. 1890; Odgers on Slander and Libel, chap. 3.)
2. The publications complained of make several charges of crime which are crimes under the laws of the United States (U. S. Rev. Stat., secs. 5506-7, 5015, 5016) and also under the laws of the State of Kentucky.
 3. Plaintiff was entitled to have the court instruct the jury that although the defendant may have published the charges upon the information of others, such information was not a justification unless the charges were really true. (Odgers, star pages 174, 539; *Idem*, chap. 6, pp. 161, 168; R. v. Newman, 1 E. & B., 268, 558; 3 C. & K., 252; 22 L. J. Q. B., 156; 17 Jur., 617; Townsend on Slander and Libel, secs. 118, 115, 116, 202, 210, 211.)
 4. Both individuals and newspapers may criticise freely the acts, utterances and character of public officers, but neither newspapers nor individuals have the right to charge a public officer with crime. Such a charge carries with it the presumption of malice. (White v. Nichols, 3 How., 226; Weathersby v. Hawkins, 1 T. R., 110; Child v. Apleck, 9 B. & C., 406; Johnson v. Evans, 3 E. S., 32; Commonwealth v. Clap, 4 Mass., 169; Bodwell v. Osgood, 3 Pick., 379; Hamilton v. Eno, 81 N. Y., 116; Jones, Varnum & Co. v. Townsen's Adm'r, 21 Fla., 485; Davidson v. Duncan, 7 E. & B., 229; Shekel v. Jackson, 10 Cush., 25; Sweeny v. Baker, 13 W. Va., 182; 57 Wis., 570; 58 Me., 295; 42 N. H., 187; Davidson v. Duncan, 7 E. & B., 231; Wieman v. McBee, 45 Mich., 484; King v. Patterson, 9 Atl. Rep., 705; Mallory v. Pioneer Press Co., 84 Minn., 521; Aldrich v. The Press Printing Co., 9 Minn., 988; Sweeny v. Baker, 13 W. Va., 158; Banner Pub. Co. v. State, 16 La., 184; Edwards v. The Kansas City Times Co., 32 Fed. Rep.; Chaffin v. Lynch, 6 S. E., 474; Robbins v. Treadway, 2 J. J. Mar.; Harwood v. Astley, 1 Bos. & P., 47; Riley v. Lee, &c., 88 Ky., 608.)

P. B. MUIR OF COUNSEL ON SAME SIDE.

F. HAGAN FOR APPELLEE.

1. The jury were instructed that if they believed from the evidence the publication was substantially true they ought to find for the defendant. This instruction left the truth of the matter complained of to the jury, as the law directs, and they found they were true. It is evident from all the proof the jury decided the case correctly.
2. But if the evidence in the case did not justify the publication, yet it is fully protected under the law of Privileged Communication. (Folkard's Starkie, 246, 688, 678, 272; Newell, 389, 391, 568, 567; Schott, 429; Patterson, 55, 75; 19 St. Tr., 1070; Hedley v. Barlow, 4 F. & F., 230; Nason v. Walter, L. R. 4 Q. B.; Miner v. Post-Tribune, 9 Mich., 859; Gott v. Pulsifer, 122 Mass., 235; 9 Phil., 594; 3 F. & F., 372; 6 M. & W., 107; Scripps v. Foster, 41 Mich., 748; Palmer v. Concord, 48 N. H., 211; Hegley v. Farrow, 60 Md., 177; Marks v. Baker,

Vance v. Louisville Courier-Journal Co.

28 Minn., 162; Kinyon v. Palmer, 18 Iowa, 377; Mott v. Dawson, 46 Iowa, 533; Crane v. Waters, 10 Fed. Rep., 619; Harle v. Catherall, 14 L. J. (N. S.), 801; Hagerman, 227, 229, 242; 2 Stephens, 876; Rowland v. DeCamp, 96 Pa. St., 493; Minor v. Detroit Post, 49 Mich., 358; Campbell v. Spotswood, 32 L. R. Q. B., 185.)

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

This was an action for libel, instituted by the appellant against the appellee by reason of the following publications appearing in the appellee's newspaper, the Courier-Journal, of date November 3, 1886:

“Wantonly Exceeding their Province. Burton Vance, a defeated Republican candidate, was at the first precinct of the seventh ward as a supervisor of election. In defiance of the law he interfered in every way with the polling of Democratic votes, challenging the voters, insisting on naturalized citizens showing their papers, and otherwise retarding the election and intimidating the voters. He will be arrested this morning for violating his oath of office.”

Also the following: “Officious Supervisors. Isaac Forst was arrested at the first precinct of the seventh ward on the affidavit of Burton Vance. This young man Vance has made himself very officious. Although a supervisor, and therefore forbidden to do any electioneering, he worked constantly for Wilson and constantly interfered with peaceable Democrats who wished to cast their ballots. He was seen to take several colored men aside and then vote them. He himself will be arrested this morning on the charge of bribery.”

The appellee admitted the publications, and pleaded that the charges made therein were true, that the language was a fair and reasonable criticism upon the conduct of a public officer, and also pleaded facts in mitigation. After

Vance v. Louisville Courier-Journal Co.

hearing the testimony the jury found a verdict for the defendant company. The appellant's counsel assign some twenty-nine errors in their motion and grounds for a new trial, all of which, however, are fully embraced in the alleged error of the court in giving and refusing instructions to the jury.

Without considering in detail the facts shown in proof upon which the finding of the jury may be supported, we advert to it as showing the proper application of the law to the facts of the case. Vance, who was a lawyer and an intimate friend of one of the candidates for Congress, had been appointed an assistant supervisor under the provisions of the Federal election law. At midnight before the morning of the election he met two Hazen detectives from Cincinnati, Ohio, made a map, a rough sketch of the streets of the city for them, and agreed with them on certain signs by which he would furnish the names of voters whom the detectives had reason to believe had been bribed. The candidate at whose instance the detectives came from Cincinnati was present when these plans were matured, and, according to the testimony of the appellant, gave positive instructions to make their arrests *irrespective of party*. On the day of the election Vance was active both inside and outside the room where the votes were being taken. He offered Wilson ballots to persons approaching to vote, before they had expressed any preference or indicated that they wanted such a ticket; he challenged voters known to be entitled to vote, and thus delayed and interfered with the election; he was seen to take voters aside and into a room a short distance away and talk with them secretly, who, when they came back, voted for Wilson. He consulted frequently with

the strangers—the detectives. He arrested Forst, and ordered Bills out of the precinct. He testifies “that he saw a number of persons going into a bar-room kept back behind the polling-place by James P. Whallen and a number of voters going therein and that he stopped it, as he *believed* that some voters were bribed from the way in which they came out and voted.”

The proof is that he browbeat and bullied the Democratic workers and voters and threatened to arrest them. The Republican worker and voter was unmolested. The Democratic supervisor was appealed to. W. B. Haldeman, one of the officers of the defendant company, and who was on the ground in company with Bills, who expressed a determination to make the necessary affidavits, then sought the chief supervisor of the election for the purpose of having Vance arrested. After a fruitless search for him they postponed action until the following morning, at which time, however, the fight being over, the intention was abandoned. This is a brief synopsis of the testimony introduced by the defendant to show the truth of the publications and to establish that the comments complained of were fair and reasonable criticisms upon the official conduct of the appellant.

We may say in this connection that the appellant proved by a number of witnesses that his conduct was in no way reprehensible or officious, and that he performed his duties impartially. The point of our inquiry is, however, was there proof in behalf of the defendant and in support of the pleas tendered by it to authorize the verdict of the jury. The court instructed the jury to award the plaintiff damages if they believed the publications were false and made maliciously, and malice was to be inferred

Vance v. Louisville Courier-Journal Co.

or presumed from the falsity of the publications, but that if they believed the statements contained in the publications were substantially true as published, or were reasonable and fair criticisms of the acts and conduct of the plaintiff as supervisor, and were made in good faith without malice, then they should find for the defendant. Proper instructions on the duties required of the supervisor were also given. We are of opinion that these instructions were substantially correct. The jury were the judges of the truth of the matters put in issue, and they were the judges of the reasonableness of the grounds upon which the newspaper charges were based. Animadversion upon the conduct of a public officer, however severe, is not libelous if it be confined within the limits of fair and reasonable criticism and based on facts.

It may be thought that the imputation of bribery contained in the printed matter was not supported in fact, but it will be observed that the supervisor upon seeing persons go in and out of a room with his opposing workers interfered with the freedom of their action upon the belief that it was evidence of bribery. Therefore he can not complain if his activity exercised in the same manner be taken as evidence of the same offense.

Judgment affirmed.

Wilson, &c., v. Teague.

CASE 10—PETITION ORDINARY—OCTOBER 21.

Wilson, &c., v. Teague.

95	47
96	175
95	47
112	506

APPEAL FROM WHITLEY COURT OF COMMON PLEAS.

1. TO ENTITLE THE PLAINTIFF TO A WARNING ORDER it is not necessary that the required facts should be stated in a separate affidavit; if they are set out in the petition, and it is sworn to by the plaintiff, it is sufficient.
2. A JUDGMENT AGAINST NON-RESIDENT DEFENDANTS WILL NOT BE TREATED AS VOID after the lapse of almost fifteen years, although the required affidavit had not been made at the time the warning order was made, as the petition containing a statement of all the facts required to authorize the warning order was sworn to after the order was made and at least a year before judgment was rendered, and the warning order attorney and the court acted upon the warning order after the affidavit was made; and, besides, the warning order itself recites that it was made upon proof as to the non-residence of the defendants.

HILL & DENHAM FOR APPELLANTS.

The warning order having been made without any affidavit upon which to base it, and that fact appearing affirmatively on the face of the record the decree and sale thereunder were void. The provisions of the Code upon the subject of warning orders should be strictly pursued. (Civil Code of 1867, secs. 88, 89; *Brownfield v. Dyer, &c.*, 7 Bush, 505; *Grigsby, &c., v. Barr*, 14 Bush, 334; *Farris v. Withrow* (Iowa), 77 Am. Dec., 117; *Hahn v. Kelly* (Cal.), 94 Am. Dec., 749, and notes, p. 766.)

LESTER & KING FOR APPELLEES.

The absence from the record of the affidavit upon which the warning order was made, does not render the judgment void. The presumption must be indulged in favor of the clerk as well as in favor of the court that the order was made in strict conformity with the provisions of the Code. (*Newcomb's Executors v. Newcomb*, 13 Bush, 544.)

CHIEF JUSTICE BENNETT DELIVERED THE OPINION OF THE COURT.

Peter Wilson died in 1894 intestate. His administrator brought suit against his heirs and creditors to settle his estate as an insolvent estate. Three of the heirs were

Wilson, &c., v. Teague.

non-residents at the time and have been continuously ever since. The fact that they were non-residents was set out in the petition, which was signed by the administrator, and they were proceeded against by warning order. A non-resident attorney was duly appointed and answered; the court gave judgment for the sale of the land in controversy, and it was sold in 1876 and possession delivered. The appellants, the said non-resident heirs, bring this suit to recover their interest in said land, upon the ground that the judgment and sale, as to them, was void, because, as they allege, the warning order was obtained without the affidavit required by the Civil Code then in force. As said, the allegations as to the non-residency of the appellants were contained in the petition, and it has been expressly decided by this court, that if the requisite facts are set out in the petition to entitle the party to a warning order, and is sworn to by the plaintiff, it is sufficient. The order of warning recites the fact that it was made upon proof heard as to the non-residency of the parties, and the record also shows that the plaintiff did thereafter swear to his petition and that the court treated the order of warning as sufficient, and rendered judgment accordingly. The affidavit was made at least a year before the rendition of the judgment, and the attorney for the non-residents acted for them thereafter, and the court likewise acting upon said order after the affidavit was made, rendered judgment, and the order of warning itself shows that it was not made without proof of non-residency. Now, then, after the lapse of nearly fifteen years, the appellants ask the court to declare the order of warning void and restore to them land that was

sold by virtue of the judgment rendered in the case to satisfy the debts of their father, and for the payment of which the land was bound, and which it did pay.

It would be trifling with justice to now take the land away from the purchasers, whose money went to pay those debts, and give it to the appellants freed from the debts for which it was originally bound and sold, unless there be some inexorable rule requiring us to do so. Happily, there is no such rule. For, according to the facts stated, the order shows that it was made upon proof of non-residency, doubtless by plaintiff himself, as an affidavit to his petition, but the clerk failed to write it in the usual form; at least, to prevent an absolute defeat of justice, we should so presume, after this long lapse of time, and thus presuming, the order was erroneous merely, and not void; and as long as it stands unreversed the appellants are bound by it. Besides, the proper affidavit having been made and the court subsequently acting on the order of warning, we must presume that the order was re-entered and re-adopted by the court.

The judgment is affirmed.

Louisville Bagging Mfg. Co. v. The Central Passenger R'y Co.

CASE 11—PETITION EQUITY—OCTOBER 24.

Louisville Bagging Manufacturing Company
v. The Central Passenger Rail-
way Company.

APPEAL FROM LOUISVILLE LAW AND EQUITY COURT.

1. **STREET RAILWAYS—GRANT OF USE OF STREET BY CITY ORDINANCE.**
—Where the right to construct and operate a street railway has been granted by resolution or ordinance of the council of a city, in pursuance of authority conferred by act of the General Assembly, the right thus given is as valid and effectual as if conferred directly by the General Assembly.
2. **THE OVERHEAD WIRE OR TROLLEY SYSTEM OF OPERATING STREET RAILWAYS BY ELECTRICITY** is not so dangerous and does not so obstruct the streets of a city as to authorize the courts to either enjoin or limit the movement of street-cars in that way.
3. **THE PLAINTIFFS CAN NOT ENJOIN THE CONSTRUCTION OF A RAILWAY TRACK IN FRONT OF THEIR MANUFACTURING ESTABLISHMENT** upon the ground that it will prevent the loading and unloading of vehicles by backing them up to and at right angle with the sidewalk, as this manner of loading and unloading necessarily obstructs the proper use of the street for all other vehicles, and, besides, is forbidden by city ordinance.

THOMAS F. HARGIS FOR APPELLANT.

1. The acts of the Legislature are silent as to what kind or system of electric railroads or electric propulsion is to be used, and in order to destroy the presumption that a dangerous system was not intended to be authorized by the Legislature, the burden is upon the defendant to show that the present system, being a dangerous system, is the only one by which it can use electricity at all for its cars. (Attorney-General v. Gas Co., 7 Ch. D., 217; Judge Taft's Opinion in Telegraph Ass'n v. C. I. P. R'y Co., pp. 24-5.)
2. Legislative power can not be delegated, and, therefore, the Legislature had no power to delegate to the municipality of Louisville authority to grant to the defendant the right to build and operate its railway. (Cooley's Con. Limit., top p. 138, 5th ed.; Auditor v. Holland, 14 Bush, 147.)
3. The Legislature and the courts are jealous of the exercise of corporate powers by corporate bodies, and no act is to be construed as granting corporate authority unless it plainly says so. This doctrine has its cor-

95	50
96	354

95	50
108	341
108	845

95	50
108	750

95	50
110	797

95	50
120	88

95	50
133	615

Louisville Bagging Mfg. Co. v. The Central Passenger R'y Co.

relative in the rule that enforces the power to protect citizens from the occupation of their lands, or the taking of their property, or invading its possession or use, without just compensation, and then only for a clearly public purpose. (High on Injunctions, sec. 625; Richards v. Des Moines R'y Co., 18 Iowa, 259; Murdock v. Prospect, &c., R. Co., 73 N. Y., 579; Evans v. M. I. & N. R. Co., 64 Mo., 453; White v. L. & N. R. Co., 7 Heisk, 573.)

4. The defendant's single trolley system is a nuisance. As to ~~what~~ constitutes a nuisance see Coal Gas Co. v. Freeland, 12 Ohio St., 392; Reinhardt v. Mentasti, 40 Alb. L. J., 490; Crawford v. Rainbow, 44 Ohio St., 279; Railroad Co. v. Carey, 8 Ohio St., 201; Cooper v. Hall, 5 Ohio, 320; Petersdorf's Common Law, vol. 8, p. 550; Cheatham v. Shearon, Swan's Rep. (Tenn.), p. 213; Gates v. Blincoe, 2 Dana, 159; United States Illuminating Co. v. Hugh J. Grant, N. Y. Law J. of Dec. 18, 1889; Opinion of Judge Taft in City and Suburban Telegraph Ass'n v. The Cincinnati Incline Plane R'y Co.
5. A failure to compensate for the right of way, either by contract with the owner, obtaining his consent, or by condemnation, subjects the defendant to an injunction. (High on Injunctions, secs. 622, 632, 635, 638.)
6. As to what is a taking of private property, see Railway Co. v. Rennick, 102 U. S., 180; Pumpelly v. Green Bay Co., 13 Wall., 174; Kemper v. City of Louisville, 14 Bush, 89; Transylvania University v. Lexington, 3 B. M., 7; Lou. & Nash. R. Co. v. Hodge, 6 Bush, 141; Balt. & Potomac R. Co. v. Fifth Baptist Church, 108 U. S., 329; Cooley's Con. Limit., p. 182; Inlay v. Union Branch R. Co., 26 Conn., 249; Eaton v. Boston, &c., R. Co., 51 N. H., 504; Fulton v. Short Route Transfer Co., 85 Ky., 640; Kemper and Wife v. City of Louisville, 14 Bush, 89; L. & F. R. Co. v. Brown, 17 B. M., 775; L. & O. R. Co. v. Applegate, 8 Dana, 290; Cosby v. Owensboro, &c., R. Co., 10 Bush, 289; Hooker v. New Haven, &c., Co., 14 Conn., 146; Roe v. Granite Bridge Co., 21 Pick., 844; Canal Appraiser v. People, 17 Wend., p. 604; Lucklin v. Railroad Co., 81 Mo., 180; Stevens v. Props. of Middlesex Canal, 12 Mass., 466; E., H. & N. R. Co. v. Grady, 6 Bush, 145; Cooley's Con. Limit., 5th ed., pp. 646-7.
7. Equitable jurisdiction and injunction are concurrent with the common law right of action for a nuisance that specially damages the citizen. (High on Injunctions, secs. 589, 623; Curran v. Shattuck, 24 Cal., 427; Balt. & Potomac R. Co. v. Fifth Baptist Church, 108 U. S., 329; Gardner v. Village of Newberg, 2 John Ch'y, 162; Irvin v. Dixons, 9 How., 110; Miller v. Mayor of N. Y., 108 U. S., 385.)

HUMPHREY & DAVIE FOR APPELLEE.

1. The street railway company had express authority from the Legislature, and from city ordinances passed by legislative authority, to construct and operate its street-car lines by electricity, and by the overhead trol-

 Louisville Bagging Mfg. Co. v. The Central Passenger R'y Co.

- ley system. (Acts of 1865-6, p. 43; Acts of 1871, vol. 2, p. 323; Acts of 1883-4, vol. 2, p. 1218; Acts of 1886-6, vol. 1, p. 526; Resolutions of Louisville city council of Feb. 23, 1888, Oct. 9, 1888, Dec. 20, 1889; Lewis on Eminent Domain, sec. 116, note; Dillon on Municipal Corporations, 4th ed., sec. 867, note; Taggart v. Newport R'y Co., 16 R. I., 668; Louisville R'y Co. v. City of Louisville, 8 Bush, 420.)
2. The grant by the Legislature to the street railway company of the right to change its street-car system from horse-power to electricity is not the creation of an additional servitude, nor the taking of property; nor does it entitle the abutting property owners to demand compensation. Such use falls within the original dedication of the property for street purposes. (Thompson on Electricity, secs. 22 and 42; Keasby on Electric Wires, sec. 11; Lewis on Eminent Domain, sec. 124; Taggart v. Newport Street R. Co., 16 R. I., 668; Rafferty v. Central Traction Co., 147 Pa. St., 589; Detroit R. Co. v. Mills, 85 Mich., 634; Koch v. North Ave. R. Co., 75 Md., 222; North Baltimore R. Co. v. North Ave. R. Co., 75 Md., 247; Farrell v. Winchester Ave. R. Co., 61 Conn., 127; Williams v. Citizens' R'y Co., 130 Ind., 71; Lockhart v. Craig, 139 Pa. St., 419; Railway Co. v. Telegraph Co., 48 Ohio St., 426; Potter v. Saginaw R. Co., 83 Mich., 299; Hudson River v. Watervliet Co., 56 Hun (N. Y.), p. 67; Tracy v. Troy R'y, 54 Hun (N. Y.), 550; Williams v. City Electric R. Co., 41 Fed. Rep., 556; Mt. Adams R. Co. v. Winslow, 20 Ohio Weekly Law Bulletin, 420; Pelton v. East Cleveland R. Co., 22 Ohio Weekly Law Bulletin, 67; In re Third Ave. R. Co., 121 N. Y., 536; Halsey v. Rapid Transit Co., 47 N. J. Eq., 880.)
 3. General experience of their use, in hundreds of cities and towns in the United States and Europe, has demonstrated that the use of the overhead trolley system of electricity, instead of mules, is cleaner, more healthful, and less injurious to the streets, less expensive to the city, and gives a far better service to the public, with less danger. No successful storage battery system, or underground wire system, of street railways has yet come into use. (Keasby on Electric Wires, p. 106; Taggart v. Newport R. Co., 16 R. I., 668.)
 4. The bagging manufacturing company had no right to obstruct the streets by backing its wagons up at right angles to the sidewalk, to load and unload them. Such conduct is an unlawful obstruction of the street; and it can not complain that the operation of the street-car system prevents it from continuing such unlawful obstruction. (Lewis on Eminent Domain, sec. 125; Dillon on Municipal Corporations, secs. 716 and 727, note; Hobart v. Milwaukee Street R'y, 27 Wis., 194 (9 American Rep., 461); Rorer on Railroads, vol. 2, p. 1426; Hogencamp v. Patterson R. Co., 17 N. J. Eq., 84.)

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

The Louisville Bagging Manufacturing Company, a

Louisville Bagging Mfg. Co. v. The Central Passenger R'y Co.

corporation, brought this action for an injunction, which was temporarily granted, restraining the Central Passenger Railway Company, a corporation, and its officers from constructing or operating an electric railway on Walnut street, between Nineteenth and Twentieth streets, in the city of Louisville, where plaintiff has a large building used for manufacturing bagging. H. R. Thompson, judge of the Louisville City Court, was also enjoined from proceeding, until termination of the action, to try J. J. Tapp, president of plaintiff, and others upon warrants against them for cutting down and removing posts erected by the railroad company for use in operating its cars.

The right to construct, and operate by electricity, the railway upon Walnut street, it appears, had been, before the action was commenced, granted to the company by resolution or ordinance of the general council of the city of Louisville, duly passed in pursuance of authority conferred by acts of the General Assembly. And as exercise of such delegated authority by municipal legislation has been often sanctioned and recognized by this court, the right so given to the Central Passenger Railway Company must be regarded as valid and effectual as if conferred directly by the General Assembly. Moreover, as legislative power to authorize construction of a railway upon a public street, and operation of it by even steam, has been distinctly and often held by this court to exist, we see no reason to deny power to likewise authorize construction of such railway to be operated by electricity. For it is well settled that the use of a public street for travel and transportation by means of railway cars falls within the purposes for which streets are established and dedicated. And it is only when other ways of travel and

Louisville Bagging Mfg. Co. v. The Central Passenger R'y Co.

transportation are prevented, or unreasonably obstructed, that courts can interfere to either enjoin or limit operation of railroad upon a public street.

It therefore seems to us the simple inquiry in this case is whether the manner in which the railway under consideration has been, or is designed to be, constructed and operated is such as to clearly impose a new and additional burden upon the land of plaintiff abutting Walnut street, and, as a consequence, entitling him to previous compensation for the right of way.

The first ground of complaint by plaintiff is that the railway track constructed in front of its manufacturing establishment will prevent loading and unloading vehicles used in transporting its goods and raw material in the manner heretofore done, which is by backing the wagon or dray up to and at right angle with the sidewalk. The answer to that complaint is, first, that such way of loading and unloading necessarily seriously obstructs not merely operation of every double-track railway, but proper use of a street for all other vehicles; second, there appears to be an ordinance of the general council prohibiting loading and unloading of vehicles in that mode.

The next ground is that operating an electric railway car upon a public street is dangerous to those who reside or do business thereon. Practical application of electricity as a power to drive machinery or move carriages, as also for illuminating purposes, is of recent date, and it is shown the system best adapted for the purpose, if yet discovered, is by no means a perfect one. The evidence of experts and men having actual experience shows that three different systems for moving railway cars by electricity have been tried in this country, viz., the underground

conduit system, storage battery system, and that of the overhead wire. And it fully appears that the first two are as yet so defective or imperfect that, of several hundred electric railways in operation, there are not a dozen to which either system has been applied, all others being run by the overhead wire, or trolley system, the same used by the Central Passenger Railway Company.

To apply electrical power in that way requires erection at edge of the sidewalk, on each side of a street, of tall poles, about one hundred and twenty feet apart, and from top of opposite poles is stretched across the street a sustaining wire, which holds up the electric wire that is thus suspended over middle of the railway track, and from which, by means of the trolley pole, the electric current is connected with the motor placed under the car.

It will be thus seen that the electric wire is not, like telegraph, telephone and electric-light wires, near to buildings, but suspended over the railway track. It further appears that the electric pressure, measured by volts, required to drive a street railway car is not so great as to destroy or seriously injure a person or animal coming in direct contact with it; injury, when it is produced, resulting only where a broken or detached telephone or telegraph wire falls on it.

The evidence in this case, which need not be considered in detail, shows that, although new and not fully perfected, the trolley system of operating street railway cars, when properly adjusted and supervised, is not much, if any more, dangerous than horse-power, and much less so than steam power, applied in the same way. Moreover, while street railway cars thus operated go at greater speed, are more comfortable, and must in time become a

Hansford v. Berry.

cheaper mode of travel, they can be easier controlled than horse-cars, and do not really more obstruct the streets, or interfere unreasonably with business transacted thereon.

It, therefore, seems to us that, in view of the benefit and convenience to the public of electric cars thus operated, and comparatively little inconvenience or danger they are to individuals, it would be going beyond the province of a court, and contrary to decided weight of judicial authority, to enjoin or limit their use, especially when a party seeking such remedy so signally, as has the plaintiff in this case, fails to show he has been unreasonably obstructed or hindered in his business, or that his rights have been illegally interfered with.

The judgment dissolving the temporary injunction and dismissing the action is affirmed.

CASE 12—PETITION EQUITY—OCTOBER 24.

Hansford v. Berry.

APPEAL FROM DAVEISS CIRCUIT COURT.

1. THE RIGHT TO A PASSWAY MAY BE CREATED BY PRESCRIPTION OVER woodland as well as over inclosed land. In either case the use of the way as a matter of right for the period of fifteen years perfects the right.
2. DISCONTINUANCE OF PASSWAY.—If the owner of land over which another has acquired a right of way by prescription wishes to inclose his land, he may apply to the county court to discontinue the right of way thus established and have another right of way opened for the benefit of the person who has acquired the right, and upon such an application the court will take into consideration the equities of all the parties, and act accordingly.

SWEENEY, ELLIS & SWEENEY FOR APPELLANT.

1. No presumption of a grant arises from the long continued use of a pass-

Hansford v. Berry.

way over uninclosed woodland. (*Bowman v. Wickliffe*, 15 B. M., 84; *Hall v. McLeod*, 2 Met., 101; *Conyers v. Scott*, 14 Ky. Law Rep., 784.)

O'Daniel v. O'Daniel, 88 Ky., 185, and *Wickliffe v. Magruder, &c.*, 12 Ky. Law Rep., 24, distinguished.

2. The frequent changes in the passway not only tend to show that the use of the road was permissive, but they go to the very root of the claim asserted by appellee. Before he can successfully assert a right to the passway it is incumbent on him to show that it had a "fixed and determinate locality." (*Bowman v. Wickliffe*, 15 B. M., 99.)
3. The chancellor should at least have directed that the passway be so changed as to relieve appellant of the great inconvenience and damage that would result to his land by leaving the passway as at present located, as this could have been done, and appellee, at the same time, protected in the enjoyment of his right to an outlet to the public road.

H. M. HASKINS FOR APPELLEE.

The passway in question has been used by appellee and his vendors as a matter of right for more than fifty years, which is sufficient to perfect appellee's right to the use. (*Washburne on Easements*, 180, 181; 2 Met., 98; 4 Bush, 318; 6 Bush, 676; *O'Daniel v. O'Daniel*, 88 Ky., 185; *Talbott v. Thorn*, 91 Ky., 417; *Bright v. Dunn*, 12 Ky. Law Rep., 689.)

Bowman v. Wickliffe, 15 B. M., 84, distinguished.

CHIEF JUSTICE BENNETT DELIVERED THE OPINION OF THE COURT.

The appellant brought his action of trespass against the appellee for removing the fences on appellant's land. The appellee justified upon the ground that the fences removed obstructed his right of way, and that they were only removed to the extent of removing the obstruction. The appellee claims a right of passway over the appellant's woodland. The appellant denies the right of passway, and claims that the use of the passway was by his permission only. So the question is: Was the passway over the appellant's woodland by right or by permission only? The lower court decided that it was by right, and the appellant has appealed. There is no proof that the right to pass over the appellant's land was ever given by

Hansford v. Berry.

any court, but the right to the passway is claimed by adverse use for more than fifty years. The case of Bowman v. Wickliffe, 15 B. Mon., 84, is relied on as sustaining the position that no presumption arises in favor of the adverse use of a passway over woodland, but that the presumption is that the passage over woodland is by permission of the owner. It will be seen from the Bowman case that for many years there were several passways over the owner's woodland; that they were changed from time to time by the owner, and one or the other discontinued as he cleared the land, and new ones opened, and that no one claimed the passway as a matter of right, but all claimed it by permission only. Under these circumstances the court held that there was no presumption of adverse use, although such permission had continued for many years; that in order to create a right of way by prescription, it must be shown that it was claimed and used as an adverse right for at least fifteen years, and as long as it was used permissively no presumption of adverse use could arise. In the case of O'Daniel v. O'Daniel, 88 Ky., 185, it was held that the Bowman case, *supra*, was unlike that case, because there the passway had not only been practically upon the same ground for many years, but the circumstances of the locality and constant and necessary use made it evident that it had been used adversely and under a claim of right. The case of Conyers v. Scott, 94 Ky., 123, reviews the Bowman and O'Daniel cases and points out the distinction very clearly. The case of Talbott v. Thorn, 91 Ky., 417, does the same. The doctrine established by the three cases *supra* is, that a right to a passway may be created by prescription over woodland if continued the requisite

Hansford v. Berry.

length of time. In such case the question is: Was the passway used as a matter of right for the period of fifteen years or more? If it was, and not in the manner indicated in the Bowman case, the right will be established over woodland as well as inclosed land.

Now let us see what the weight of the evidence establishes. It is, first, that the appellant has no other way to reach the Livermore public road, which leads to the county seat, than the way in controversy. Second, that it has been used for such purpose at least fifty years, and by the appellee at least twenty years. And third, that the passway has been all the time substantially at the same place, and all the time has had a well-defined road-bed. Fourth, that the way has been kept up by the appellee as his passway; that the changes in it are only such as resulted occasionally from the fall of a tree across the road-bed, or similar obstructions. These facts clearly create the presumption that the passway was used as a matter of right, and having been so used for fifteen years and more, the appellee's right to its continued use is established. If it be a fact that appellant wants to clear his ground and fence it up there is nothing in this opinion that precludes him from applying to the county court to discontinue the right of way established in this case, and have another right of way opened for the benefit of the appellee. In which case the court will take into consideration the equities of all parties, and act accordingly.

The judgment is affirmed.

CASE 13—PETITIONS ORDINARY—OCTOBER 26.

Commonwealth v. Owensboro, Falls of Rough, &c.,
R. Co.

Commonwealth v. Louisville & Nashville R. Co., &c.

Commonwealth v. Mammoth Cave R. Co., &c.

Commonwealth v. Elkton & Guthrie R. Co., &c.

Commonwealth v. Burnside, &c., R. Co., &c.

Commonwealth v. Hodgenville, &c., R. Co., &c.

Commonwealth v. Louisville Southern R. Co.

Commonwealth v. Louisville, Hardinsburg & West-
ern R. Co., &c.

Commonwealth v. Ohio Valley R. Co., &c.

Commonwealth v. Louisville, St. Louis & Texas R. Co.

Commonwealth v. Louisville Southern R. Co., &c.

Commonwealth v. Ky. & Ind. Bridge Co.

Commonwealth v. Ky. Midland R. Co.

Commonwealth v. Kensee Coal Co.

Commonwealth v. Owensboro & Nashville R. Co., &c.

APPEALS FROM FRANKLIN CIRCUIT COURT.

1. EXEMPTION OF RAILROADS FROM TAXATION—REPEAL OF STATUTE.—

The act of May 5, 1884, providing for the exemption from taxation, for a period of five years, of all railroads thereafter built in this State, was repealed by the general revenue law of May, 1886, which, after providing for the taxation of "all property," except such as was specifically exempted by its provisions, provided for the repeal of certain acts by their titles, "and all other acts, general and special, and parts of acts inconsistent herewith or not in conformity herewith."

2. SAME.—The fact that the act of May 5, 1884, was, subsequent to the time at which the general revenue law of 1886 went into effect, embodied in an edition of the General Statutes, which was adopted by the Legislature, can not be regarded as a legislative construction that

Commonwealth v. Railroad Companies, &c.

the act of 1884 was not repealed by the general revenue law, as that law with its repealing clause is found later on in the same edition.

3. **SAME.**—If the language of an act be certain, its object can never be defeated by any amount of contemporaneous interpretation, no matter how consistent or how widely adopted it may have been. It is only where the words of the statute are of doubtful meaning that the courts will resort to contemporaneous interpretation.
4. **THE REPEAL OF THE ACT OF 1884 IS INOPERATIVE** as to railroads the construction of which was commenced prior to September 14, 1886, the date at which the repealing act took effect, as the Legislature had no power to withdraw the exemption from those who had expended their money upon the assurances of the act.
5. **THE ACT OF 1856, RESERVING THE RIGHT TO REPEAL OR AMEND CHARTER PRIVILEGES** granted by the Legislature to particular persons, has no application to the law of 1884, which was a general law affecting alike all who accepted its promises or acted on the strength of them.
6. **APPELLATE PRACTICE.**—The court having overruled a demurrer to the plea of exemption interposed by the defendants, a dismissal of the petitions was bound to follow; and although the State afterward introduced testimony to sustain the allegations of its petitions, and the petitions were dismissed on final hearing, neither a motion for a new trial nor a separation of the conclusions of law and fact was necessary to enable this court to review the questions of law, which were the only questions before the court, there being no contrariety of testimony.

WM. J. HENDRICK, ATTORNEY-GENERAL, AND REID ROGERS FOR APPELLANT.

1. The act of 1884, conferring an exemption from taxation upon newly constructed railroads for five years, was repealed by the revenue law of May 17, 1886.

Express Repeal: Bishop on Written Law, sec. 162; Sutherland on Statutory Construction, p. 199; State v. Kelly, 84 N. J. Law, 77; Commonwealth v. Churchill, 2 Met., 122.

Legislative Intent: Endlich on Interpretation of Statutes, sec. 8. Rule, *Generalia Specialibus*, &c.; Sutherland, sec. 158, also p. 214; Bishop on Written Laws, sec. 162; Endlich, secs. 231, 206, 234, 359.

Effect of Clause Repealing Inconsistent Legislation: State v. Minton, 8 Zab., 531; Bank of Jersey City v. Assessors, 30 N. J. Law, 112; State v. Miller, 30 N. J. Law, 369; Adams v. Ashby, 2 Bibb, 96; Hickman v. Littlepage, 2 Dana, 345; Chatteroi R. Co. v. Skinner, 81 Ky., 222; Treacy v. Elizabethtown, &c., R. Co., 86 Ky., 276; Jarrell v. Commonwealth, 9 Ky. Law Rep., 572.

Contemporaneous Interpretation: Endlich, p. 506; United States v. Graham, 110 U. S., 221; Smythe v. Fiske, 28 Wall., 374; United States v. Moore, 95 U. S., 760; District of Columbia v. Hatton, 143

Commonwealth v. Railroad Companies, &c.

- U. S., 27; *Collins v. Henderson*, 11 Bush, 92; *Railroad Commissioners' Report*, 1887, p. 188; *Louisville Water Co. v. Clark*, 148 U. S., 1.
2. The Legislature had the power to withdraw the exemption, there being no vested right. (*Tomlinson v. Jessup*, 15 Wall., 454; *Hoge v. Railroad Co.*, 99 U. S., 854; *Commonwealth v. Fayette County R. Co.*, 55 Pa. St., 452; *Railway Co. v. Supervisors*, 85 Wis., 257; *Tucker v. Ferguson*, 22 Wall., 574; *Church Wardens v. Co. of Phila.*, 24 How., 802; *Salt Co. v. East Saginaw*, 18 Wall., 376; *Welch v. Cook*, 97 U. S., 543; *Shiner v. Jacobs*, 62 Iowa, 392.)
 3. The exemption act of 1884 has not since its repeal been revived or re-enacted. (*Gen. Stats.*, p. 157; *Commonwealth v. Pointer*, 5 Bush, 303; *Session Acts*, 1890-91, chap. 518.)
 4. Although there was no motion for new trial this court may consider the sufficiency of the pleadings and also whether there was any testimony whatever to support the judgment. (*Helm v. Coffey*, 80 Ky., 176; *Henderson v. Dupree*, 82 Ky., 681.)
American Aid Society v. Bronger, 91 Ky., 406, distinguished.

THOMAS H. HINES OF COUNSEL ON SAME SIDE.

JOHN W. RODMAN FOR LOUISVILLE & NASHVILLE RAILROAD COMPANY.

1. In the absence of a separation of conclusions of law and fact and of a motion for new trial this court can consider nothing except the sufficiency of the pleadings to support the judgment. (*Artsman v. Thoma*, 4 Ky. Law Rep., 430; *Boulware v. Griffith*, 4 Ky. Law Rep., 724; *Goetz, Recr., v. Loretto Literary and Benevolent Ass'n*, 4 Ky. Law Rep., 735; *Am. Mut. Aid Society v. Bronger*, 91 Ky., 406; *Lawson v. Marshall*, 12 Ky. Law Rep., 292; *Harbor v. Harris' Adm'r*, 8 Ky. Law Rep., 965; *L. & N. R. Co. v. Mazzoni*, 9 Ky. Law Rep., 151; *Collins v. Wheeling*, 9 Ky. Law Rep., 1013; *Seeley v. Potter & Co.*, 11 Ky. Law Rep., 185; *Southern Div. Cumb. & Ohio R. Co. v. Marion County*, 11 Ky. Law Rep., 329.)
2. The exemption act of 1884 was not repealed by the revenue law of May 17, 1886.

The act of April 10, 1888, adopting as the law of the land the edition of the General Statutes, published in 1887, by Bullitt & Feland, which embraces the exemption act of 1884, is a legislative construction of the act of 1886 and such a recognition of the act of 1884 as should be conclusive of the case.

The court in interpreting a statute will take judicial notice of contemporaneous history. (*Endlich on Int. of Statutes*, sec. 29, p. 30; *Idem*, sec. 357, p. 499; *Idem*, sec. 360, p. 505; *Lake v. Caddo Parish*, 37 La. An., 788.)

The law does not favor repeals by implication. (*Endlich on Int. of Statutes*, sec. 210, p. 280; *Idem*, sec. 215, p. 287; *Idem*, sec. 223, p.

Commonwealth v. Railroad Companies, &c.

298; *DeWinton v. Brecon*, 28 L. J. Ch., 600; *State v. Township Committee* (N. S.) 8 Centr. Rep., 251; *Blaine v. Bailey*, 25 Ind., 165; *Williams v. Pritchard*, 4 T. R., 2; *Rounds v. Waymart Borough*, 81 Pa. St., 305; *Elizabethtown & Paducah R. Co. v. Trustees of Elizabethtown*, 12 Bush, 286.)

Louisville Water Co. v. Clark, 148 U. S., 1, distinguished.

3. If the act of 1884 was repealed, the companies which had, prior to the repeal, expended money upon the faith of the act had acquired a vested right to the exemption, and as to them the repeal is inoperative. (*McGee v. Mohlers*, 4 Wall., 143; *Pacific R. Co. v. McGreen*, 20 Wall., 86; *Wilmington R. Co. v. Reid, Sheriff*, 13 Wall., 264; *Humphrey v. Pogue*, 16 Wall., 244; *Commonwealth v. Green & Barren River Nav. Co.*, 78 Ky., 73; *University v. People*, 99 U. S., 309.)

WM. LINDSAY AND H. W. BRUCE OF COUNSEL FOR LOUISVILLE & NASHVILLE RAILROAD COMPANY.

HELM & BRUCE FOR LOUISVILLE, ST. LOUIS & TEXAS RAILWAY COMPANY.

1. The plaintiff having failed to ask for a separation of the court's conclusions of law and fact, the rulings upon the law must be treated by this court as the law of the case, whether right or wrong.
2. The failure of the Commonwealth to move for a new trial leaves nothing for this court to decide except whether the plaintiff would have been entitled to a peremptory instruction in case the jury had not been dispensed with. (*Helm v. Coffey*, 80 Ky., 176; *Henderson v. Dupree*, 82 Ky., 680.)
3. The original exemption was valid.

The question as to whether the Hewitt Bill repealed the act of exemption, as also the question as to whether or not the exemption has been re-enacted, is left to other counsel.

HUMPHREY & DAVIE FOR LEXINGTON BELT RAILROAD COMPANY.

1. The failure to move for a new trial is fatal on appeal. (*Helm v. Coffey*, 80 Ky., 176.)
2. The failure of the Commonwealth to have a separate finding of the law and facts is also fatal to the appeal. (*Am. Mut. Aid Society v. Bronger*, 91 Ky., 406.)
3. The act exempting new railroads from taxation is not repealed by the Hewitt Tax Law of 1886.

The contemporaneous construction put upon the Hewitt law as not repealing the exemption of new railroads is controlling on the court's construction of the Hewitt Act. (*United States v. Alabama R. Co.*, 142 U. S., 615; *Hastings v. Dakota Railway*, 132 U. S., 866; *Robertson v. Downing*, 127 U. S., 608; *Barbour v. City of Louisville*, 88 Ky., 95.)

The Hewitt Act being a general law, will be considered as excepting

Commonwealth v. Railroad Companies, &c.

from its operation those things already specially provided for by special and particular laws. (Supervisor of Walworth county v. Village of Whitewater, 17 Wis., 193; State v. Minton, 23 N. J. Law, 581; Rounds v. Waymart Borough, 81 Pa. St., 395; State v. Brannin, 28 N. J. Law, 485; Commonwealth v. Cain, 14 Bush, 525.)

HOLMES CUMMINS FOR OHIO VALLEY RAILWAY CO. AND HODGENVILLE & ELIZABETHTOWN RAILWAY CO., &c.

1. The Legislature has no power to repeal the exemption act of 1884, or charter exemptions, large sums of money having been expended by defendants upon the faith of these exemptions.

Acts of incorporation are contracts within the meaning of the Constitution, and laws impairing the obligation of such contracts are unconstitutional when the right to amend is not reserved in the act of incorporation or by general law. (Hamilton v. Keith, 5 Bush, 461; Slack v. M. & L. R. Co., 13 B. Mon., 25; Louisville v. University, 15 B. Mon., 674; Gregory v. Trustees, &c., 2 Met., 597; Green & Barren River Nav., case 79 Ky., 73; Constitution United States, art. 1, sec. 10; Constitution of Ky., art 18, sec. 20.)

The act of 1856 (Gen. Stats., chap. 68, sec. 8) does not reserve the right to withdraw or repeal *immunities*, but expressly stipulates that no amendment or repeal shall impair "other rights" than "franchises and privileges;" and an immunity from taxation is an "other right" than what is termed a franchise or privilege. (Railroad Co. v. Gaines, 97 U. S., 687; Trask v. McGuire, 18 Wall., 381; Morgan v. Louisiana, 98 U. S., 217; The State v. Railroad Co., 12 Lea (Tenn.), 583.)

2. There was no intention to repeal. A familiar rule of construction presumes that the Legislature knows the construction put by the courts of the country upon the laws of the land, and that the Legislature acts with knowledge of the course of judicial decision. Applying this rule here, we must presume that in 1886, when enacting the Hewitt law, the General Assembly not only had in mind the exemption act of 1884, but also the rule announced by this court in the case of Elizabethtown, &c., R. Co. v. Trustees of Elizabethtown, 12 Bush (decided in 1876). And further, that again in 1888, when adopting the Bullitt & Feland edition of the General Statutes, containing both the act of 1884 and the Hewitt Revenue Law of 1886, the Legislature did not consider the two in conflict or the one as repealing the other, but rather relied on the rule of construction followed by the court in 12 Bush case, as safely preventing any misconstruction.

E. F. TRABUE FOR E. T., V. & G. RY. CO. AND K. & I. BRIDGE CO.

1. The Commonwealth totally failed to establish the case made by its petitions, and its petitions should have been dismissed. (Gossum v. Badgett, 6 Bush, 97.)

Commonwealth v. Railroad Companies, &c.

The statute imposed on the auditor the duty of obtaining the information concerning the length and value of these railroads, and the auditor had no right to delegate this authority to the Railroad Commission. Under the statute the auditor has his duty and the Railroad Commission has its independent duty, and the failure of either to perform such duty is fatal to the claim of the Commonwealth. (*State ex rel Harvey v. Cook*, 82 Mo., 185; *Northern Pac. R. Co. v. Carland*, 3 Pac. Rep., 134; *Cooley on Taxation*, 260.)

2. In the absence of a separation of the conclusions of law and fact and of a motion for a new trial this court can not review the lower court's findings of law or fact. (*Am. Mut. Aid Soc. v. Bronger*, 91 Ky., 406; *Helm v. Coffey*, 80 Ky., 176; *Henderson v. Dupree*, 82 Ky., 980.)
3. The exemption act of 1884 was not repealed by the Hewitt Revenue Law of 1886. (*E. & P. R. Co. v. Elizabethtown*, 12 Bush, 288.)
Louisville Water Co. v. Clark, 148 U. S., 1, distinguished.
4. The Legislature had no power to repeal, as the defendants had expended large sums of money upon the faith of the exemption and could not be placed *in statu quo*. (*Commissioners v. Green & Barren River Nav. Co.*, 79 Ky., 78; *McGehee v. Mather*, 4 Wall., 143.)

JOHN W. & HARRY G. RODMAN FOR MAMMOTH CAVE R. CO., &c.,
AND FOR KENSEE COAL CO.

DULANEY & MITCHELL OF COUNSEL FOR MAMMOTH CAVE R. CO., &c.

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

The principal questions involved on the foregoing appeals are common to all of them, and for that reason the cases are heard together.

On May 5, 1884, the General Assembly of the State adopted the following act:

“An act to encourage the building of railroads in the Commonwealth of Kentucky, and to exempt from taxation all railroads which may be hereafter built under existing charters, or under charters which may be hereafter granted for a period of five years from the date of the beginning or the construction of such new roads.

“§ 1. That all railroads which may hereafter be built within this Commonwealth under existing charters, or under charters which may be hereafter granted, shall be

exempt from all taxation under the laws of this Commonwealth for a period of five (5) years from the date of the beginning of the construction of such new roads.

“§ 2. *Be it further enacted*, That this act take effect from and after its passage.”

The appellees are railroad companies which began the construction of their respective roads after the adoption of this act; and on the faith of which act they are claiming an exemption from State taxation for five years from the time of such beginning.

The appellant by these suits, instituted in the Franklin Circuit Court, is seeking to collect taxes from the appellees, in spite of the act aforesaid, on the ground that in May, 1886, by an act taking effect September 14, 1886, the Legislature repealed the act relied on by the appellees. This latter act is known as the “Hewitt Revenue Bill.” It is entitled “An act to amend the revenue laws of the Commonwealth of Kentucky.” It is an elaborate general revenue statute, providing under separate articles (1) the rate of taxation, (2) stocks in banks and other institutions, (3) *railroads*, (4) turnpike roads and other corporations, (5) license tax, (6) the assessor and his duties, (7) board of supervisors, (8) duties of clerks, (9) collection of the revenue, etc., etc.

Section 1 of article 1 provides that an annual tax of forty-seven cents upon each one hundred dollars of value of *all the real and personal estate* directed to be assessed for taxation, due and payable the fiscal year assessed, shall be paid by the owner or persons assessed. By section 3 it is provided that all property, real and personal, within the State “*not herein expressly exempt by law,*” shall be assessed, as nearly as practicable, according to a uniform

Commonwealth v. Railroad Companies, &c.

rate and in the manner provided in detail by the act. And a succeeding section provides what property shall be exempt from taxation, namely: Property of the United States, property of the Commonwealth, cattle of certain value, etc., etc.

Article 2 provides for the taxation of “stocks in banks and other institutions.”

Section 1 of article 3 provides that “the president or chief officer of *each railroad company*, or other corporation owning a railroad, lying in whole or in part in this State, *shall*, on or before the first of September in each year, return to the Auditor of Public Accounts of the State, under oath, the total length of such railroad . . . with the average value per mile thereof;” and by a succeeding section it is provided that the same *rate of taxation* for State purposes, which is or may be in any year levied on other real estate, shall be levied upon the value so reported and found of the railroad, rolling stock and real estate of *each company*.

After providing for the taxation of turnpike roads and other corporations, imposing license taxes and regulating the duties of assessors, boards of supervisors, clerks and sheriffs in relation to the revenue, the act concludes (section 5, article 12) as follows:

“Chapter 92 of the General Statutes, the act of March 28, 1872, entitled ‘An act to amend chapter 83 of the Revised Statutes, titled “Revenue and Taxation;” the amendment to said act of March 28, 1872 entitled ‘An act to amend an act, approved March 28, 1872, authorizing sheriffs to sell real estate to pay revenue tax,’ approved April 19, 1873, the act approved April 2, 1878, title ‘An act to amend section 6, article 6, chapter 92, General

Commonwealth v. Railroad Companies, &c.

Statutes,' 'An act to amend article 2 of chapter 92 of the General Statutes, title "Revenue and Taxation," approved May 8, 1884, and *all other acts, general and special*, and parts of acts *inconsistent* herewith, or *not in conformity* herewith, are *repealed*; but nothing in this act shall interfere with any existing local option, or any special or prohibition law in any county, nor with any local or general law for creating or collecting county levy, or with chapter 1315 of the Acts of 1879-80—'Agricultural and Mechanical College Tax'—or with an act entitled 'An act for the benefit of the branch penitentiary at Eddyville,' approved April 7, 1886.

"§ 6. Nothing in this act shall be held to repeal or in any way impair the force and effect of any local or special act, or any general law in force, or that may hereafter be passed, providing for the appointment of collectors of State revenue or county levy and poll tax, in any county of the State, nor shall anything herein be construed to repeal or impair the force of any special or local law giving to counties or towns, for road or street purposes, the fines collected for violations of the road and bridge laws of said county."

In determining the force and effect of this latter act on prior legislation, general or special, regulating taxation in the Commonwealth, it is evident that its general purpose and intent should be given much weight.

Manifestly, the act of 1886 is intended to compass and reform the entire revenue law of the State—to constitute in itself a general and complete revenue system. As argued by counsel, "it singles out no special defects here and there, but is aimed broadcast at the whole structure.

Commonwealth v. Railroad Companies, &c.

Else why should it have re-enacted, as it does, many old laws in identical and equivalent terms?"

This general purpose, to be made effective and uniform, must sweep away a mass of special and class legislation adopted in pursuance of the system theretofore in practice.

We notice, first, that *all* property, real and personal, shall be assessed for taxation, save that *expressly exempted* in the act itself. Not content with this, the act proceeds to *repeal all acts and parts of acts, general and special, inconsistent with itself or not in conformity to itself.*

Can it be said that the act of 1884, providing by a general law for a tax exemption, for a specified time, of the property of all newly built railroads in the State, the force of which was to continue the exemption forever or indefinitely, is not inconsistent with an act intended to embrace the whole tax law of the State, demanding the equal and uniform taxation of all property within the State, *save the property of the United States, the Commonwealth of Kentucky, etc.?* And demanding specifically and without exception or exemption, the taxation of all the property of *each* railroad company within the State? We think not.

Manifestly there is the most positive repugnancy between the two acts, and upon abundant authority, if any were needed to sustain so evident a proposition, the latter act supersedes and repeals the former. "An intention to supersede local and special acts (Endlich, sec. 231) may be gathered from the design of the act to regulate by one general system or provision the entire subject matter thereof, and to substitute for a number of detached and

varying enactments one universal and uniform rule applicable throughout the State."

"Ordinarily," says Mr. Bishop in his work on Written Laws, section 152, "if there are a general statute and one local or special on the same subject in conflicting terms, neither abrogates the other, but both stand together, the former furnishing the rule for the particular locality or case, the latter for the unexcepted places and instances. And it is immaterial which is of the later date. But when from anything cognizable by the judges, they are satisfied the general law was meant by the Legislature to supersede the local or special one, they will give it that effect."

Here the repeal is gathered not merely because the acts are inconsistent, but because the latter in express terms repeals all acts and parts of acts, general and special, inconsistent therewith or not in conformity thereto. Sutherland on Stat. Const., page 214, says, that when a general act is passed "and repeals all inconsistent legislation, it will have the effect to repeal all special acts which are in conflict with it." And Endlich, section 206, says, that such a clause removes the chief objection to repeals by implication.

We may notice in this connection that the act of 1884, strictly speaking, is not a local one. Its operation is uniform and general on the class to be affected. As said by counsel, "it was passed for no local purpose, nor with any individual instance in view, but as a general law, of whose benefits corporate persons not yet in being might avail themselves."

It was engrafted into the General Statutes of the State and formed a part of the general revenue law of the

State in existence when the general revenue act of 1886 was adopted. And the latter must be held to repeal the former.

In *Louisville Water Co. v. Clark*, 143 U. S., 1, the Supreme Court held that the act of 1886 was a general revenue act, and considering the purpose of its enactment and the fact that it required the taxation of *all* property within the State, unless expressly exempted by its provisions, and repealed all inconsistent acts, general or special, it was held to repeal the special act of that company exempting it from taxation. Much stronger we think is the argument that repeals the *quasi* general act exempting newly built railroads.

On the other hand it is contended that as there is no reference to the act of 1884 in the alleged repealing act, its repeal would be one by implication, which is not favored. We have seen, however, that considering the general purpose of the act of 1886 and its express repeal of inconsistent acts, the Legislature must have intended the latter act to constitute in itself a complete system of taxation.

It is urged that there has been a legislative construction of this act of 1884 conclusive of the question.

In 1887 Messrs. Bullitt and Feland collated and published the acts of the Kentucky Legislature regarded as in force and effect; and in 1888, the General Assembly, by an act of April of that year, *adopted* the edition of the General Statutes as thus prepared, from chapter 1 to 113a, inclusive. The act of 1884 relied on by the appellees as exempting them from taxation is found embodied in the edition of the statute named. So, however, is found later on in the same edition the act of 1886, repealing, as ap-

pellant contends, the former act. We are left, therefore, where we started—with the solution of the question depending at last on the terms and provisions of the acts themselves and the circumstances and purposes of their enactment.

It is insisted that there has been a contemporaneous interpretation of these statutes by the officers whose duties were to enforce them, favorable to the contention that the one was not intended to repeal the other.

Thus, the Auditor, after 1886, continued to report these roads as “non-taxable roads.”

The Railroad Commissioners, in some of their reports, incorporate the act of 1884 as if in full force and effect, and make report of the length and valuation of the roads merely for statistical purposes. The Governor, in his message of December 30, 1889, says: “Taxes were paid, however, on only \$34,174,272 valuation of property, as the residue, amounting to \$10,516,631, is at present exempt from taxation by the terms of their charters.”

“So,” say counsel for the appellees, “we have this act construed by the Legislature, the Governor, the Railroad Commissioners and the Auditor, and without the Commissioners and the Auditor it was impossible to execute the law.”

It may be admitted that the interpretation given the statute by these officers might be persuasive evidence of its meaning if the repealing act were uncertain, doubtful or ambiguous. In *United States v. Graham*, 110 U. S., 221, it is said of a law considered unambiguous: “Such being the case, it matters not what the practice of the department may have been, or how long continued, for it can only be resorted to in aid of interpretation, and it

is not allowable to interpret what has no need of interpretation. If there were ambiguity or doubt, then such a practice begun so early and continued so long, would be in the highest degree persuasive, if not absolutely controlling in its effects."

So this court, in *Collins v. Henderson*, 11 Bush, 92, says: "Where the words of an act are obscure or doubtful, and where the sense of the Legislature can not with certainty be collected by interpreting the language of the statute according to reason and grammatical correctness, considerable stress is laid upon the light in which it was received and held by contemporary members of the profession."

If the language of an act be certain, its object can never be frustrated by any amount of contemporaneous interpretation, no matter how consistent or how widely adopted it may have been. A construction against the plain meaning of the law as expressed by its terms, even in aid of justice or right, or to avoid an absurdity, is never permissible. (Endlich, p. 506.)

Considering, therefore, the question of repeal disposed of, the inquiry remains, what effect does the repeal of the act of 1884 have upon the rights of the appellees, some of whom began the construction of their roads prior to the repeal and some of them subsequently thereto?

It results, of course, without further argument, that the property is subject to taxation of such of the appellees as commenced the construction of their roads after the repeal of the act on which they rely for exemption. Without this exemption act of 1884, their property is upon the same footing as other property in the State. They can not say, after September, 1886, we relied on this exemption

Commonwealth v. Railroad Companies, &c.

act, expended our money in the construction of these roads on the strength of the act of 1884, and therefore have acquired certain rights which the Legislature can not take away! The exemption had been withdrawn before they began the work or expended their money. Certainly the State takes away none of their property, and circumscribes none of their property rights. It simply treats their property as it does that of others, because subject to the same general law of taxation. The State, however, contends that the same is true of the property of those of the appellees who began the construction of their roads while the law of 1884 was in force, that is, at a time prior to September 14, 1886.

It is contended that the exemption act is a mere bounty which the State may withdraw at pleasure; and more than that, that even if the act to encourage the appellees to construct their roads be regarded as forming a contract with the State of an obligatory character, yet the power reserved to the State by the law of 1856 authorized any change in the contract desirable by the State, or even its entire revocation. Quoting from *Tomlinson v. Jessup*, 15 Wallace, 454, a leading case on the subject under consideration, counsel contend that "immunity from taxation, constituting in these cases a part of the contract with the Government, is, by the reservation of the power such as is contained in the law of 1841 (here 1856), subject to be revoked, equally with any other provision of the charter, whenever the Legislature may deem it expedient for the public interest that the revocation shall be made."

It is sufficient to say of this proposition, which even at first blush strikes one as extraordinary and unjust, if attempted to be applied to those of the appellees who

accepted the offer of the State, and expended their money on its exemption pledge, that the act of 1856, reserving the right to repeal or amend *charter privileges* granted by the Legislature to particular persons, has no application to the law of 1884, which, as said before, was a general law, and affected alike all who accepted its provisions or acted on the strength of them. No contract was made with any person, natural or artificial, upon the adoption of this act; though by accepting its terms certain rights might be secured under the nature of contract rights. But no reservation, express or implied, can be said to have been made therein by virtue of the act of 1856. Being a general law it was revocable at pleasure; but it does not follow that it might be revoked so as to injuriously affect the citizen accepting its provisions, in violation of the pledge of the State and the common principles of justice. The State, to promote the ends of development, to afford greater facilities for transportation, and to bring into its borders an increased volume of property, shortly to help bear the common tax-burden, says to the railroad people, build up your enterprises and expend your capital in our midst, and in consideration of the premises we will grant you a brief respite from the tax-gatherer! We think the State can not withdraw its pledge of immunity from those who acted upon the assurances of this act, and that the property of the appellees beginning their work prior to the repealing act of September 14, 1866, and thus accepting the provisions of the act of 1884 while it was in force, can not be subjected to the taxation sought to be imposed in these actions. The private exemption acts pleaded by some of the appellees come clearly within the principle decided in *Louisville Water Company v. Clark*, *supra*.

The immunity claimed was withdrawn by the act of 1886. A question of practice only remains for settlement.

The plaintiff alleged the facts with reference to each road constituting its cause of action, thus, that annual reports of the railroad authorities to the Auditor, of the length and valuation of their respective roads within the State, had been made; that these were annually, and before September 1, laid before the Railroad Commissioners, who proceeded to value and assess the property set forth in these reports; that a statement of such was thereupon returned to the Auditor, who notified the defendants of the amount of the assessment, and the tax due, etc.

The defendants denied these allegations in detail, explaining, as to the reports of their officers when made, that they were furnished for statistical purposes merely. In a separate paragraph the act of May, 1884, was pleaded as affording them immunity from the taxation sought to be imposed. A demurrer to this paragraph was overruled. This defense constituted a complete bar to recovery, and no matter what proof might be adduced by the State in support of the issues otherwise made by the answers, the end necessarily resulting from the ruling of the court in sustaining this plea of exemption was bound to be a dismissal of the petition.

The State, looking perhaps to the contemplated appeal, and with a view of having all the controverted facts established by proof, and having the cases ready for a final judgment should the legal question be determined in its favor in the appellate court, introduced the secretary of the State Railroad Commission and the Auditor's clerk, who proved facts conducing to establish the allegations in the petitions. The defendants introduced no witness, but

had their witnesses to file certain additional reports as records. The court on final hearing dismissed the petitions, and the State appealed without having made a motion either for a new trial or for a separation of the law and facts. We do not think either was necessary. The petition seems to have presented a good cause of action. When the plea of exemption was erroneously sustained it really ended the case, or at least put an end to the possibility of recovery by the plaintiff. The facts shown in proof appear to sustain the State's right to recover. There was no contrariety of testimony—a few pamphlets and reports of officers only were filed; and when the case was finally dismissed, there was in fact nothing before the court save questions of law. There was no disagreement as to what was shown in the books, though the legal effect of the facts so shown was a subject of difference of opinion. The court passed on nothing save legal questions, and these this court may review in the absence of the motions for a new trial and a separation of the law and facts. Upon a return of the cases, or such of them as will be indicated, the demurrer to the plea of exemption will be sustained, and then the facts of the alleged assessments, notices, etc, may be fully inquired into.

From the records before us the following appellees appear to have commenced the construction of their roads after September 14, 1886:

Owensboro, Falls of Rough & Green River Railroad Company.

Louisville & Nashville Railroad Company, etc. (being the Cumberland Valley Branch and Extension; the Middle Division, Cumberland & Ohio, known as the Springfield

Commonwealth v. Railroad Companies, &c.

Branch, and the Clarksville & Princeton Division. The last-named division seems exempt for five years after its commencement on October 31, 1884).

The Burnside & Cumberland River Railroad Company.
Hodgenville & Elizabethtown Railroad Company.

Louisville, Hardinsburg & Western Railroad Company, etc.

Louisville, St. Louis & Texas Railway Company (No. 178), and Kentucky Midland. And the judgments therein are therefore *reversed*.

The following appellees commenced the construction of their roads while the act was in force, and are therefore entitled to the five years' exemption from the date of said commencement, but from the record it appears the exemption expired, and the State appears entitled to recover for a part of the time. The petitions were dismissed and the judgments are *reversed* for that reason :

Ohio Valley Railroad Company.

Louisville Southern Railroad Company, etc. (No. 180).

Kentucky & Indiana Bridge Company.

Kensee Coal Company.

The following appellees commenced their roads while the act was in force, and are not sued for any year for which they are not exempt, and for that reason the judgments are affirmed as to them :

Elkton & Guthrie Railroad Company.

Mammoth Cave Railroad Company.

Louisville Southern, etc. (No. 175), and Owensboro & Nashville, and Louisville & Nashville (No. 184).

The judgments in the cases indicated as erroneous are reversed, with instructions to proceed as herein indicated.

Lewis, &c., v. Citizens National Bank.

CASE 14—PETITION EQUITY—OCTOBER 28.

Lewis, &c., v. Citizens National Bank.

APPEAL FROM LOUISVILLE CHANCERY COURT.

1. **TRUSTS.**—Where a father as trustee for one of three daughters executed a conveyance to himself as trustee for the other two, although there was nothing in the deed itself to indicate the nature of the trusteeship or the terms or conditions of the trust, yet as it appeared from the evidence that the property conveyed was paid for out of an estate held by the father as trustee for his children under the will of their grandfather, the character of the holding by the trustee and the ultimate disposition of the interest of one of the beneficiaries upon her death are matters to be controlled by the will.
2. **CONSTRUCTION OF DEVISE—POWER OF APPOINTMENT—CONTINGENT INTEREST.**—Under a devise by a testator to a father in trust for his children with "power to use the principal for his children, or any of them, equally or unequally," the father took a power of appointment which may be exercised by him so as to defeat the interest of any particular child, and therefore each child took only a contingent interest, and upon the death of one of them nothing passed to his heirs, the power of appointment not being affected or circumscribed thereby.
3. **SAME.**—Where a testator has by a codicil to his will placed a construction upon a particular clause of his will, that construction must control.

BLANTON DUNCAN FOR APPELLANTS.

1. A condition defeats the estate to which it is annexed only at the election of him who has a right to enforce it; and notwithstanding its breach the estate, if a freehold, can only be defeated by an entry made. (2 Washb. on Real Property, p. 12; Cross v. Carson, 8 Blackf. (Ind.), 188; s. c., 44 Am. Dec., 743; Kenner v. American Contract Co., 9 Bush, 206.)
2. The ninth clause of the will created a vested remainder, but this was changed by codicil. (Howe v. Moore, 4 Mon., 221; Boone v. Doyle, 3 Mon., 537; Burnside v. Wall, 6 B. M., 324.)

Under the Kentucky decisions the word "children" is synonymous with "issue," "heirs" or "descendants." (Dunlap v. Shreve, 2 Duv., 335; Feltman v. Butts, 8 Bush, 119.)

As to the distinction between vested and contingent remainders, see Bowling v. Dobyns, 5 Dana, 441; 2 Johns (N. Y.), 288; 1 Yates (Pa.), 340; Williamson v. Williamson, 18 B. M., 376; Johnson v. Jacob, 11 Bush, 655; Maundersen v. Lukens, 23 Pa. St., 31; Stephens v. Evans, 80 Ind., 89; 4 Kent's Comm., p. 202.)

Lewis, &c., v. Citizens National Bank.

3. Where a testator creates a life estate in one with remainder to another, with power to the life tenant to defeat the remainder by disposing of the property by deed or will, the power of disposition does not convert the life estate into a fee unless it is exercised. (*McCullough's Adm'r v. Anderson*, 90 Ky., 126; *Friend v. Oliver*, 27 Ala., 532; *Christy v. Pulliam*, 17 Ill., 59; *Dixon v. McCue*, 14 Gratt. (Va.), 5; *Doe v. Martin*, 4 Term Rep., 89; *Sugden on Powers*, 151, 5th London ed.)

The Ballard case, 83 Ky., 481, makes the case at bar impregnable, and is in no point whatever against the appellants.

4. The trust created by the will of Garnett Duncan is still in existence, and as there is nothing whatever in the deed of 1878 to show that it is the creation of a trust, the court must look to the will to determine the objects and nature of the trust. (*Perry on Trusts*, secs. 920, 99, 77, 81; *Lewin on Trusts*, vol. 1, pp. 169, 306 * (a), 913, 892, 894; *Attorney-General v. Lady Downing*, Wilm., 23; *Lane v. Dighton*, Amb., 409; *Lewis v. Madock*, 17 Ves., 67; *Price v. Blackmore*, 6 Beav., 407; *Hopper v. Conyers*, 2 L. R. Eq., 549; *Cleveland v. Hallet*, 6 Cush., 403; *Ready v. Kearsley*, 14 Mich., 226.)

W. O. HARRIS FOR APPELLEE.

No brief in record.

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

The question involved in this case is the right of the appellee to subject to sale an undivided one-fourth interest in two houses and lots, on Main and Market streets in the city of Louisville, in satisfaction of a judgment against Blanton Duncan, one of the appellants, for \$1,750, with interest at six per cent per annum from April 17, 1872, for two years, and with ten per cent interest per annum from that time on until paid.

The title to this property, as shown by deed of November 12, 1878, was in Blanton Duncan as trustee of his daughters Kate B. Duncan and Georgette Duncan. Georgette having died intestate, her father and mother, appellees contend, inherited her one-half of the property,—that is, one-fourth each—the sister Kate owning the other half. It is this undivided one-fourth interest of the father—the judgment debtor—the sale of which is sought.

The conveyance in the deed spoken of was from Blanton Duncan, trustee of Mary T. Duncan, and Mary T. Duncan, to Blanton Duncan, trustee of Kate B. Duncan and Georgette Duncan, and was in consideration of the payment of nine thousand dollars cash paid the grantors by the grantee of such trustee, and four thousand dollars to be paid thereafter. The terms of the conveyance were such that the trustee of the daughters was empowered at any time, without the intervention of the Louisville Chancery Court, to sell and convey the property and re-convert the same into personality. From the conveyance itself, there is nothing to indicate the nature of this trusteeship for the daughters or the terms or conditions of the trust. But from the record it appears that Blanton Duncan in 1875 had been appointed trustee for his children under the will of his father, Garnett Duncan, and from the funds of that estate belonging to himself, as such trustee, he had made the cash payment of \$9,000. The character of the holding by the trustee, therefore, and the ultimate disposition of the interest of Georgette at her death, are matters to be controlled by the will of Garnett Duncan. The chancellor seems to have regarded this deed of November, 1878, as alone creating this trust, and from this premise correctly construed the holding to be in fee. But this instrument, though it declared, did not create any trust. The will of Garnett Duncan alone did that. The acceptance of the trust and its management are shown by the exhibits in the various chancery suits referred to, and the settlements in the Jefferson County Court made by the trustee.

Looking to this will we find the following provisions:

“Eighth. I give and bequeath and devise to my three

Lewis, &c., v. Citizens National Bank.

granddaughters, Mary, Kate and Georgie, all the shares that I may own at the time of my death in the East London Railway Company, and also my lands in Indiana, near Jeffersonville. . . .

“Ninth. . . . The remainder that may be left in the hands of my executors, together with the unpaid notes of Mr. Thompson, I give to my son Blanton, as a trustee, to be invested in his discretion in improving the Indiana land, or otherwise for the use of his said three daughters.”

Signed, &c.

“Codicil. . . . In lieu of the eighth clause, I give and devise all my East London Railway shares, and all my land in Indiana, that may be owned by me at the time of my death, to my son Blanton Duncan, as a trustee, for his use and support for life, and at his death to be equally divided among his children, and their descendants, such descendants to take *per stirpes*.” . . .

“The ninth clause is thus modified: . . . In the latter part of this ninth clause, I substitute the word ‘children’ for the words ‘said three daughters,’ so that any future child or children will be embraced in this trust which is independent of that created by the eighth clause, —for this last trust gives him power to use the principal for his children, or any of them, equally or unequally.”

Whatever doubts may have existed as to the power given the trustee by the language of the original ninth clause, we must admit the right of the testator to construe it for himself. That construction is a part of his will and is controlling. By it he enlarges the trust, or converts it into a power, by the exercise of which the son may use absolutely the estate—its body or principal—for his children, or any of them, and by such a distribution as he

pleases, that is, to them in equal or unequal portions. This is a power of appointment which can be exercised at any time during the lifetime of the life-tenant. The existence of this power does not destroy the limitation over to the remainderman after the life estate, but the power may be so executed by the life-tenant under this power of apportionment as to substantially destroy the interest of any particular remainderman. The existence of this power and the possibility of its exercise is inconsistent with the view that the deceased daughter took a vested remainder. From the very nature of the case, her holding was contingent. Manifestly her death does not affect or circumscribe the power given under the will. The investment is only temporary. Whether as a matter of fact the trustee expended for her use largely more than her proportionate share of the estate, as contended by him, we need not inquire.

The chancellor conceded that if the property was held under the trust and power created by the will of Garnett Duncan, it could not be subjected to the payment of the plaintiff's debt, but it was thought that the evidence establishing this trust was secondary and incompetent, and seemingly held that the deed itself must furnish the evidence of the nature of the trust. The contrary doctrine is abundantly shown by all the authorities. (Perry on Trusts, secs. 77, 99; Lewin on Trusts, vol. 1, pp. 169, 405.)

The judgment is reversed, with directions to dismiss the petition.

Shinkle's Assignee v. Bristow. Same v. Bishop.

CASE 15—PETITION EQUITY—OCTOBER 28.

Shinkle's Assignee v. Bristow.

Shinkle's Assignee v. Bishop.

APPEALS FROM KENTON CHANCERY COURT.

1. **ASSIGNMENT FOR CREDITORS—DOWER RELINQUISHED BY SEPARATE DEED.**—A deed of assignment for the benefit of creditors passes to the assignee the title to the real estate conveyed, although by virtue of statute (Gen. Stats., chap. 63, art. 1, sec. 22) the assignee can not pass the title to another unless the sale shall be in pursuance of a judgment of court, or the maker of the deed of trust shall join in the writing evidencing the sale. Therefore the wife of the assignor may, by a deed subsequently executed by her alone, pass her potential right of dower.
2. **TRUST FUND HELD BY ASSIGNOR APPLIED BY HIM TO PAYMENT OF HIS DEBTS.**—Where a debtor who made an assignment for the benefit of his creditors was, by an agreement with the assignee, allowed to reserve his family residence in consideration of his removing a lien upon other property and of his wife relinquishing her dower, the lien having, with the knowledge and consent of the assignee, been removed by the use of a fund held by the debtor in trust for others, the beneficiaries of the trust fund are entitled to be reimbursed out of the proceeds of the assigned estate, their money having been applied to the payment of the debts of the assignor with the knowledge and consent of the assignee.
3. **VOLUNTARY TRANSFER BY DEBTOR.**—The fact that the stock which constituted the trust fund was paid for by the debtor in part out of his own means as a gift to the beneficiaries, who were his children, does not give his creditors the right to subject any part of the fund, as he was at the time of the gift in a prosperous pecuniary condition.

CHARLES H. FISK FOR APPELLANTS.

1. The legal title of Vincent Shinkle to the property mentioned in the trust deed passed to the grantees in that deed, and therefore the separate deed of Emily Shinkle passed her dower. (Gen. Stats., chap. 24, secs. 19, 20 and 21; Harrison, &c., v. Hobbs, &c., 1 Bibb, 152; Reed, &c., v. Welch, &c., 11 Bush, 459.)

For a distinction between the statute relating to an assignment deed and other deeds of trust, see Ogden v. Grant, 6 Dana, 475; Whitaker v. Blair, &c., 3 J. J. Mar., 236; Prather, &c., v. McDowell, &c., 8 Bush, 46; Ship v. Bowmer, &c., 5 B. M., 164; Hatcher & Wife v. Andrews, 5 Bush, 564; Massey v. Sebastian, 4 Bibb, 436; Stearns v. Swift, 8 Pick., 532; Bigelow on Estoppel, 2d ed., p. 340.

Shinkle's Assignee v. Bristow. Same v. Bishop.

2. There is an entire want of equity in the claim of Mrs. Shinkle, now Mrs. Bristow, and she is estopped by her deed to claim dower. (Rusk v. Fenton, 14 Bush, 490; Wimmer v. Ficklin, 14 Bush, 198; Drye, &c., v. Cook & Green's Trustees, &c., 14 Bush, 460; Heck v. Fisher, &c., 78 Ky., 646; Connolly v. Branstler, 8 Bush, 702; Craddock v. Tyler, 8 Bush, 861; Athey, &c., v. Knotts, 6 B. M., 29; Divine & Brown v. Steele, 10 B. M., 325; Rudd v. Matthews, 79 Ky., 479; Butler v. Miller, 15 B. Mon., 625; Alexander v. Ellison, &c., 79 Ky., 148; Drake v. Glover, 30 Ala., 382; McCullough v. Wilson, 21 Pa. St., 436; Cantrill v. Risk, 7 Bush, 160; Whitaker, &c., v. Blair, &c., 8 J. J. Mar., 241; Smith v. Wilson, 2 Met., 235; Johnston v. Ferguson, 2 Met., 505; Sharp v. Proctor, 5 Bush, 400; Hobson, &c., v. Hobson's Ex'or, 8 Bush, 666; Hedger v. Ward, &c., 15 B. Mon., 116; Bourne & Wife v. Simpson, 9 B. Mon., 458; Vaughn, &c., v. Hann, 6 B. Mon., 348; Hardin's Ex'ors v. Harrington, &c., 11 Bush, 867; Lockett's Adm'r v. James, &c., 8 Bush, 28; Lowry v. Fisher, 2 Bush, 70; Dugan v. Massey, &c., 6 Bush, 81; Stuart v. Wilder, 17 B. Mon., 58; Willis v. Woodward, 2 Bush, 215.)
3. The Shinkle children are without equity, and ought not to be heard to claim any part of the proceeds of the sale of lot No. 75 on Garrard street. They can not take advantage of their own wrong. (Curd v. Dodds, &c., 6 Bush, 681; Foster v. Shreve, 6 Bush, 519; Brothers v. Porter, &c., 6 B. Mon., 106.)
A latent equity will not avail even infants. (Hardin's Ex'ors v. Harrington, &c., 11 Bush, 878.)

JAMES W. BRYAN FOR APPELLANTS.

Appellees having allowed the shares in the building association to be taken in their father's name, and then stood by and allowed him to pledge the stock to Collins without asserting their claim, it is now too late for them to do so. Their conduct was such as to throw the assignees off their guard.

O'HARA & BRYAN OF COUNSEL ON SAME SIDE.**COLLINS & FENLEY FOR APPELLANTS IN SHINKLE'S ASSIGNEES, &c., v. BRISTOW, &c.**

1. The deed of assignment passed the legal title to the grantees, and therefore the separate deed subsequently executed by the grantor's wife passed her dower. (Gen. Stats., chap. 24, secs. 19 and 20; Kay v. Jones, 7 J. J. Mar., 40; Cantrill v. Risk, 7 Bush, 160; Lockett's Adm'r v. James' Adm'r, &c., 8 Bush, 28; Dugan v. Massey, 6 Bush, 81; Lowry v. Fisher, 2 Bush, 70; Burrill on Assignments, secs. 42, 100, 104 and 122; United States v. Clark, 1 Paine, 629; United States v. Mott, 1 Paine, 188.)

Sec. 22 of art. 1, chap. 63, Gen. Stats., is not a limitation upon the

Shinkle's Assignee v. Bristow. Same v. Bishop.

title but upon the power of the trustees. (*Butler v. Miller*, 15 B. M., 625; *Reed, &c., v. Welsh, &c.*, 11 Bush, 461.)

2. *Mrs. Shinkle is estopped by her deed.* (*Craddock v. Tyler*, 3 Bush, 861; *Connolly v. Branstler*, 3 Bush, 702.)

**COLLINS & FENLEY AND RICHARD P. ERNST FOR APPELLEES
IN SHINKLE'S ASSIGNER, &c., v. BISHOP, &c.**

The money of these appellees having been applied to the discharge of the Sinton mortgage, they are entitled to be reimbursed out of the assigned estate. The law of substitution applies. (*Patterson v. Pope*, 5 Dana, 245; *Wickliffe's Ex'ors v. Breckinridge's Heirs*, 1 Bush, 447; *Bank of Hopkinsville v. Rudy*, 2 Bush, 829; *Ætna Life Ins. Co. v. Middleport*, 124 U. S., 545; *St. Louis Railway v. Commercial Ins. Co.*, 139 U. S., 285; *Treadway v. Pharis' Adm'r*, 18 S. W. Rep., 225.)

JAMES P. TARVIN FOR APPELLEE BRISTOW.

L. H. NOBLE FOR CHAMPION COAL & TOW BOAT CO.

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

These two appeals being involved in the same litigation will be considered together. Vincent Shinkle in the month of August, in the year 1883, being largely indebted, and the owner of much valuable real estate in the county of Kenton, made a deed of assignment of all his property, real and personal, to Wm. Fenley and R. T. Miller, for the payment of his debts. The assignment was general in its character, and vested in his assignees the title to his real and personal estate. The deed was put to record, and his assignees, upon investigating the condition of his estate, ascertained that one Sinton held a mortgage upon his residence property in Covington, and a vacant lot, for a large sum of money. Shinkle's wife had not united with her husband in the deed of conveyance to the assignees, and therefore had a potential right of dower in all the realty it purported to convey. Shinkle and his wife being desirous of retaining their Garrard street residence, proposed to the assignees to take the Garrard

street residence, subject to the mortgage of Sinton, for seventeen thousand dollars, the household furniture, buggy, harness, and certain stocks in insurance and bridge companies, and in consideration therefor would release the mortgage on the vacant lot, valued at six thousand dollars, so as the assignees would hold it free of incumbrance; and Mrs. Shinkle would also release her dower interest in all the real estate conveyed, *except the residence property*, etc. The proposition was submitted in writing, signed by both husband and wife, and accepted by the creditors, the assignees being directed to make such conveyances as required upon the compliance by Shinkle and wife with the terms of their proposition. Shinkle and wife having released the mortgage on the vacant lot, or the one valued at six thousand dollars, the assignees, on the 29th of August, 1883, re-conveyed the Garrard street residence to Vincent Shinkle, subject to Sinton's lien, and Mrs. Shinkle on the same day executed a conveyance relinquishing her dower in all the realty but the family residence.

After the assignees had obtained a perfect title to all the realty but that re-conveyed to Shinkle, they instituted an action to sell the realty and wind up the estate, filing with their petition the exhibits or evidences of title.

After the real estate had been sold under the judgment of the chancellor, Mrs. Shinkle filed her petition to be made a defendant, alleging the death of her husband, and asserting her right to dower in all the real estate conveyed by her husband to the assignees, and if not allotted to her in the realty, that its value be paid over to her from the proceeds of sale.

Her right to dower is claimed because, as she alleges,

Shinkle's Assignee v. Bristow. Same v. Bishop.

the deed to the family residence was, by the terms of the proposition, to have been made to herself and husband jointly, and that when the deed was executed to the husband alone she did not understand its purport—that it was represented to her, when the written proposition was made, that the residence property was to have been conveyed to her. While the written proposition was not binding on the wife, when executing its provisions by the deed relinquishing her potential right of dower, it passed her interest to the assignees, and is irrevocable, unless the parties to it practiced a fraud upon her in order to obtain her relinquishment. That she knew the manner in which the terms of the compromise or settlement were carried out and fully executed is apparent, and there is no pretense that any fraud was practiced upon her by any of the parties interested in the settlement, and the only question of such importance as demands consideration is the effect to be given the deed of the wife relinquishing dower in which the husband has not united. He had previously conveyed all this realty to his assignees by an absolute conveyance for the benefit of creditors; but it is argued this only vested in the assignees an equitable interest, with no power to sell or convey the title, unless empowered to do so by the judgment of the chancellor.

Article 1 of section 22 of chapter 68, General Statutes, is relied on by the wife, who obtained the judgment below, as settling this question. It provides: "No sale of any real estate by a trustee by virtue of a deed of trust or pledge to secure the payment of debts shall be valid, nor shall the conveyance by the trustee pass the title to the property specified in such deed or pledge, unless the sale thereof shall be in pursuance to a judgment of court, or

the maker of such deed or pledge shall join in the writing indorsing the sale."

It is plain the trustee has no power to sell or pass the title except in the manner provided by this statute, and equally clear that but for the statute the trustee could sell and pass the fee. The title, however, must be in the assignee or the grantor, and under the common law rule it is evidently in the assignee or trustee, but the statute intervenes and places a limitation on the power of the trustee only for the protection of the grantor and creditors, and prohibits a sale and conveyance by him unless by the direction of the chancellor or the consent of the grantor. It does not divest the trustee of the title, but says, in effect, you have the title, but shall not pass it except in the mode prescribed by the statute. It will not be contended that the trustee would be without power to convey in the absence of this statute, and the limitation placed on his right to sell by its provisions, only requires the passing of the title from the assignee in a prescribed mode, for without this limitation the trustee, being invested with title, could sell and convey at his own will and pleasure.

Section 20 of chapter 24, General Statutes, in regard to the conveyance of real estate by married women, reads: "The conveyance may be by the joint deed of the husband and wife, or by separate instrument, but in the latter case the husband must first convey or have theretofore conveyed." The husband having conveyed to the assignee, the subsequent conveyance by the wife relinquishing her dower in the land previously conveyed by the husband, passes her potential right. In *Cantrill v. Risk*, 7 Bush, 158, the conveyance was held to have been in contemplation of insolvency, and inured to

Shinkle's Assignee v. Bristow. Same v. Bishop.

the benefit of creditors. The wife set up her claim for dower in the real estate conveyed, and this court held that it was a valid deed, and the fact that it was held to be an assignment did not restore to her the right to dower which had been alienated by it. The law may step in and prevent the alienation of property by the grantee, although the legal title passes, when others become interested by reason of the conveyance to him, and he holds it merely in trust for beneficiaries; and in this class of cases many reasons exist why the rights of creditors as well as the grantor should be protected against improvident sales and conveyances by those vested with the title, holding it alone for the benefit of others. In our opinion, the conveyance by the feme passed her potential right of dower, and the judgment is reversed, with directions to enter a judgment dismissing the petition of the appellee.

In the other branch of this case is involved the right of the children of Vincent Shinkle to recover of the assignees the amount of a trust fund held by Shinkle in trust for his children, and was appropriated by Shinkle with the knowledge of the assignees, in releasing the lien of Sinton on the lot that Shinkle and wife had agreed to release in the settlement already referred to, by which Shinkle was permitted to retain his family residence. Shinkle, in the year 1872, subscribed for his children nine shares of stock in the Home Security Building and Loan Association in the city of Covington. Some of the dues were paid by Shinkle and some by the children. In the year 1879 this corporation ceased to exist, and in payment of what was coming to these children, handed over to their father two notes on one Leopold for seven hundred

Shinkle's Assignee v. Bristow. Same v. Bishop.

and fifty-two dollars each, one due on the 1st of January, 1884, and the other on the 1st of January, 1885.

These notes were assigned to V. Shinkle in the following manner :

“ Pay to the order of V. Shinkle.

“ Home Building Association.”

Shinkle held these notes until he made his assignment in August, 1883, and in order to release the lien on the vacant lot, valued at six thousand dollars, and to enable him to retain his family residence under the contract between himself and his wife, on the one part, and his creditors, as stated in the opinion applicable to the wife's claim for dower. He pledged to one Collins both of these notes as collaterals, and obtained from him the money that was applied to the extinguishment of the Sinton lien. Collins collected the notes on Leopold in satisfaction of the amount he had let Shinkle have, holding the notes as collaterals. The children sued Collins, on the ground that he had notice of the trust when he received the notes as collateral, but the court holding otherwise, there was a judgment against them. The children of Shinkle, the appellees, filed a cross-petition in case of Collins, asking the chancellor, in the event that Collins was not liable, that they be allowed out of the proceeds of the sale of this lot the amount of the two notes, with interest. The assignees claim the notes as the property of their grantor and assignor, and deny the right of the children to the money. It is evident from the facts of this case that neither the assignees or V. Shinkle regarded the Leopold notes as a part of V. Shinkle's estate. Shinkle held the notes, and when endeavoring to raise the money to release this lien, the assignees, or one of them, disclaimed any .

Shinkle's Assignee v. Bristow. Same v. Bishop.

interest in them, and for that reason Collins took them as collaterals, and advanced the money, as the assignee well knew, for the purpose of releasing this lot from the incumbrance upon it. The money obtained from Collins having been actually paid on the lien claim, and the assignee for creditors occupying no better position than Shinkle himself would, we see no reason why, when the proceeds of this trust fund have been applied in removing their liens, the beneficiaries of the trust are not in equity entitled to a judgment for the amount of these notes with the interest, to be paid out of the proceeds of this sale of the lot. Shinkle paid the proceeds of the trust notes over to Sinton. The assignee informed Collins that he had no claim on the notes. The fund realized from the two notes has been traced directly into the fund belonging to the creditors. It has been applied to the payment of the debts of the trustee with the knowledge of and consent to its appropriation by the assignee. The money is in court out of which this trust can be secured. There has been no laches on the part of the children affecting creditors. But for the payment of this lien out of the trust fund, the assignee would have been compelled to furnish the money out of the estate of Shinkle, or submit to a sale by Sinton to satisfy the lien. The fund is in court for distribution, and the claims of creditors must be held subordinate to that of the beneficiaries of this trust. While it appears the grantor and father of these children paid the premiums or monthly dues, it is not claimed that he was insolvent at the time, but on the contrary, the facts show that he was then in a prosperous pecuniary condition. The judgment in the case of Bishop and others is affirmed, and reversed as to the widow, now Mrs. Bristow.

Malone v. Conn, &c. Aims, &c., v. Same.

CASE 16—PETITIONS EQUITY—OCTOBER 31.

Malone v. Conn, &c.
Aims, &c., v. Same.

APPEALS FROM LOUISVILLE CHANCERY COURT.

1. **SALES OF INFANTS' REAL ESTATE.**—Real estate in which infants own a remainder interest can be sold only for the purpose of reinvestment as provided by section 491 of the Civil Code. There can not be a sale of such property under section 490 of the Code. And the fact that the life tenant, as guardian for the infant remaindermen, asks a sale of the property, alleging that the owners are joint tenants and that the property can not be divided, does not vest the possession in the remaindermen so as to authorize the sale. Therefore, the purchaser at such a sale does not acquire such a title as a court of equity will require one who has purchased from him to accept.
2. **DOWER AND CURTESY.**—While dower is not an estate until assigned, an estate by the curtesy takes effect as a freehold estate immediately on the death of the wife.

BULLITT & SHEILD AND C. M. LINDSAY FOR APPELLANTS.

1. Specific performance should never be compelled, unless an undoubted, good and marketable title can be made. (2 Warvelle on Vendors, p. 760; Rawle on Covenants of Title, sec. 32; Jeffries v. Jeffries, 117 Mass., 184; Richmond v. Gray, 3 Allen, 523; Griffin v. Cunningham, 19 Grat. (Va.), 571; Morgan v. Morgan, 2 Wheaton, 290; Gill v. Wells, 59 Mo., 492; Kelly v. Bradford, 3 Bibb, 317; Lyon v. Swayne, 67 Pa. St., 439; Pratt v. Eby, 67 Pa. St., 404.)
2. Courts of equity have no inherent jurisdiction to sell property of persons under disability, but must look solely to the statute for jurisdiction. (Henning v. Harrison, 13 Bush, 723; Smyser v. Walker, 79 Ky., 581; Civil Code, secs. 490, 491.)
3. Dower and curtesy are entirely different estates, and dower does not constitute an estate in land until assigned. (2 Minor's Institutes, 157; Scribner on Dower, vol. 2, 27; Powers v. Powers, 12 Ky. Law Rep., 723.)
4. A trustee or person occupying a fiduciary relation will not be permitted to traffic in the trust estate for his own benefit. (Faucett v. Faucett, 1 Bush, 544; Mitchell v. Moore, 7 Bush, 660; Covington & Lexington R. Co. v. Bowser, 9 Bush, 492, 508; Perry on Trusts, sec. 197; Clements v. Ramsey, 7 Ky. Law Rep., 445; Rogers v. Burbridge, 7 Ky. Law Rep., 48.)

95	98
99	272
95	93
112	279
112	280
95	93
117	282
118	319
118	656
95	93
120	154
95	93
131	656

Malone v. Conn, &c. Aims, &c., v. Same.

JOHN S. JACKMAN FOR APPELLEES.

1. The Law and Equity Court had jurisdiction to order the sale. (Civil Code, sec. 490; *Power v. Power*, 12 Ky. Law Rep., 798; *Kean v. Tilford*, 81 Ky., 605; *Henning v. Barringer*, 10 Ky. Law Rep., 674.)
2. The confirmation of the sale passes a good title, unless some secret fraud has been practiced upon the court, and only those are affected who have notice. (*Clements v. Ramsey*, 9 Ky. Law Rep., 174.)
3. The policy of the courts in this State has always been to uphold judicial sales whenever it can be consistently done, and where there is a doubt it is generally solved in favor of the validity of such sales.

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

These cases involve the same question and are considered together.

These were actions below to enforce the execution of contracts for the sale of realty by which the vendors bound themselves to make a good title. The defense is, a want of title in the vendor, or such a title as the purchaser should not be required to accept.

Mrs. Winstanly owned this land in fee, and dying, the land descended to her four children—two of whom are now infants. Her husband, the father of these children, became tenant by the curtesy. He held, therefore, an estate for life with remainder to the children.

Winstanly qualified as guardian of the children, and filed an action in the Law and Equity Court of the City of Louisville, asking to have the realty sold, alleging that the owners had a vested estate in possession, were joint tenants, and the property could not be divided, &c., filing the evidences of title. There was no effort to have the estate or its proceeds reinvested, or a bond executed for that purpose, as provided by section 491 of the Code, but the parties proceeded to sell under section 490, upon the idea the remaindermen were in the possession and were holding as joint tenants. There was no surrender of the

life estate by which that interest was merged in the remainder; on the contrary, the value of the life estate was deducted from the purchase price. The father and guardian became the purchaser, and, it is manifest, held by his purchase as trustee for his children, but whether subsequent purchasers would be affected with notice by reason of the judicial proceedings, presents a very different question, as the chancellor might authorize or sanction the purchase by the guardian when for the benefit of his wards.

In this case the life tenant is proceeding against the remaindermen, and the chancellor derives his power to sell the estate of these infants from the statute. Its provisions must be substantially followed. Section 491 provides the manner in which a reversion or remainder interest may be sold belonging to infants. The owner of the particular estate may institute the proceedings against those in remainder, or the remaindermen against the life tenant, but the proceeds must be held for investment in other real estate. This is, therefore, not a proceeding under section 491. Section 490 provides that a vested estate in realty jointly owned may be sold by order of a court of equity if the share of each owner be worth less than one hundred dollars; and secondly, if the estate be in possession and can not be divided without materially impairing its value or the value of the plaintiff's interest therein.

This statute applies only to estates in possession by those holding jointly, and can not be held to apply in cases where the possession is with the particular estate, or the estate for life. Nor will the court construe the statute as permitting the life tenant to surrender the possession and vesting it in the remaindermen by merely asking that

Malone v. Conn, &c. Aims, &c., v. Same.

his life estate be sold, for if this can be done, there is no necessity for section 491, as in every instance where parties when the owner of the particular estate saw proper, or the guardians of the infants, a petition could be filed and the land sold under section 490 without making any investment for the infants out of the proceeds.

Section 491 was evidently enacted to protect infant remaindermen, and section 490 to give relief to joint tenants in *possession* where the land can not be divided without materially injuring the parties in interest. This court has placed a liberal construction on these statutes, with a view of upholding sales where purchases had been made in good faith and the interest of infants benefited by a sale under them, but to permit the life tenant to proceed, as in this case, would be to disregard the plain letter and meaning of the two sections.

The case of *Power v. Power*, 12 Ky. Law Rep., 793, was not a construction of this section, the court holding only that the widow acquired the title by virtue of the assignment and not before. The title vests in such a case in the heirs, subject to the widow's right of dower, and there the title remains until dower is assigned. Says Mr. Minor in his *Institutes*: "There is a radical difference between a right of dower and an estate by the curtesy. The latter takes effect as a freehold estate immediately on the death of the wife; on the other hand, dower is not in any sense an estate until assigned." (2 Minor's *Institutes*, 157.) This is the common law rule, the widow not being vested with the title or the power. She has no legal seisin or right of entry until dower is assigned. (Scribner on Dower, vol. 2, 27.) Whether or not this right of entry is affected by our statute is not necessary to determine,

The First Nat'l Bank of Covington v. The D. Kiefer Milling Co.

as it is plain the vested interest in remainder without the possession did not authorize the sale under section 490.

In the case of *Kean v. Tilford*, 81 Ky., 600, where the parties held as tenants in common, their several interests being different, this court held that as the parties before the court all owned the realty, the mere fact of one interest being greater than another, did not prevent the sale under the statute. There may not be a unity or equality of interest, but where the parties, plaintiffs and defendants, all own the estate and are in the possession, the fact that one of the essentials required to create a joint tenancy at the common law is absent, will not preclude a sale under the statute. It follows that the title exhibited is not such as the chancellor should require the appellees to accept.

Reversed and remanded for proceedings consistent with this opinion.

CASE 17—PETITION EQUITY—OCTOBER 31.

The First National Bank of Covington v.
The D. Kiefer Milling Company.

APPEAL FROM KENTON CHANCERY COURT.

1. **ATTACHMENTS.**—The single fact a defendant has no property in this State subject to execution, or not enough thereof to satisfy the plaintiff's demand, is not sufficient to authorize an attachment, but the additional and independent fact that the collection of the demand will be endangered by delay in obtaining judgment or a return of no property found must also be alleged and shown.
2. **ASSIGNMENTS FOR CREDITORS—PRIORITY OVER ATTACHMENT.**—In a contest between equities that which is prior in time must prevail. Therefore, as an assignee for the benefit of creditors acquires an equitable title by the delivery to him of the deed of assignment duly executed and acknowledged, although not lodged for record, his equity

Vol. 95—7

95	97
106	19
106	84
106	85
95	97
109	390

The First Nat'l Bank of Covington v. The D. Kiefer Milling Co.

is superior to that created by the subsequent levy of an attachment upon the property assigned.

3. **CORPORATIONS—DEBTS INCURRED IN EXCESS OF AMOUNT ALLOWED BY CHARTER.**—A person dealing with a corporation must, at his peril, take notice of its charter or articles of incorporation. Therefore, where the articles of incorporation provide that the company shall not incur any liability in excess of a certain amount, one who makes a loan to the corporation in excess of that amount is not entitled, in the event of an assignment by the corporation for the benefit of creditors, to a *pro rata* upon that part of his debt in excess of the amount the corporation was allowed by its articles to incur.

In this case the indebtedness of the corporation was limited by its articles to \$30,000. A bank made a loan of \$77,000 to the corporation. Subsequently the corporation made an assignment for the benefit of creditors. In this action for a settlement and distribution of the assigned estate, *Held*—That the bank is entitled, as against other creditors, to a *pro rata* upon only \$30,000 of its debt. What would be the rights of the bank if there were no other creditors is not determined.

J. F. & C. H. FISK FOR APPELLANT.

1. The bank was entitled to an attachment under the second subdivision of sec. 194 of Civil Code. (*Burdett v. Phillips & Bro.*, 78 Ky., 246; *Francis v. Burnett*, 84 Ky., 80.)
2. A deed of assignment does not convey even an equitable title until lodged for record. (Gen. Stats., chap. 24, sec. 10.)
3. The alleged deed of assignment was inoperative while it remained in Graziani's office, because whether it should ever operate or not was to depend upon events to occur or to be ascertained thereafter. (*Ware v. Allen*, 128 U. S., 590.)
4. An assignee for creditors is not a purchaser for value, but stands merely in the shoes of the assignor. (*Bank of Commerce v. Payne & Viley, &c.*, 86 Ky., 446; *Kleine, Timberman & Co., v. Nie, &c.*, 11 Ky. Law Rep., 588.)
5. There was, in fact, no organization to execute a deed of assignment, and all acts done in the name of the company were absolutely void. (*Brent v. Bank of Washington*, 10 Pet., 615; *Union Bank v. Laird*, 2 Wheat., 390; *Kenton Ins. Co. v. Bowman, &c.*, 84 Ky., 436.)
6. The purpose of the assignment was to put the property in a condition so that the bank could not reach it by an attachment, and therefore the assignment is void. It is the purpose with which the grantor acts that characterizes the conveyance and renders it fraudulent under the statute. (*Bank of Commerce v. Payne & Viley*, 86 Ky., 468.)
7. The sales of drafts on and after the 11th day of December, during the next ensuing ten days, were not loans to the milling company. It was only when the bank presented the drafts to the drawees and the

The First Nat'l Bank of Covington v. The D. Kiefer Milling Co.

bills were dishonored that the milling company became liable thereon to the bank. Therefore the bank was an unwilling creditor. (*Hernodon v. Louisville Banking Co.*, 10 Ky. Law Rep., 584.)

8. If a corporation exceeds its powers it is accountable to the State, but it can not turn upon its creditors and destroy their debts because it has secretly violated its own charter. It is estopped to deny its liability. (*Mason & Foard Co. v. Main Jellico Mountain Coal Co.*, 87 Ky., 478; *Green's Brice's Ultra Vires*, 162; *Idem*, note, pp. 372, 373, 374; *Railroad Co. v. McCarthy*, 96 U. S., 266; *Morawetz on Private Corporations*, secs. 80, 81, 46, 47, 50, 62-65, 75-79, 97, 98, 100, 103, 105; *Hotel Co. v. Wade*, 97 U. S., 13; *Twin Lick Oil Co. v. Marbury*, 91 U. S., 587; *Insurance Co. v. McCain*, 96 U. S., 84; *Sanderson v. Iron and Nail Co.*, 34 Ohio St., 442; *Gold Mining Co. v. National Bank*, 96 U. S., 640; *Bigelow on Estoppel*, pp. 419, 422, 423 and notes; *New York & New Haven R. Co. v. Schuyler*, 84 N. Y., 30, 73; *Vining et al. v. Bricker*, 14 Ohio St., 381, 385; *Harris v. Runnels*, 12 How., 79-87.)
9. The attachments must prevail against the fraudulent deed, and against any and all claims preferred or asserted by Graziani. (*Moffatt v. Ingham*, 7 Dana, 496; *Lyne, &c., v. Bank of Ky.*, 5 J. J. Mar., 556; *McKinley, &c., v. Combs, &c.*, 1 Mon., 106; *Hord's Adm'r v. Rust, &c.*, 4 Bibb, 282; *German Ins. Co. v. Nunes, &c.*, 80 Ky., 384; *Lowry v. Fisher, &c.*, 2 Bush, 70; *Stewart & Co., v. Hall, &c.*, 3 B. M., 221; *Byrd v. Bradley*, 2 B. M., 289.)

JAMES P. TARVIN FOR APPELLEES.

1. The record shows that the bank had actual knowledge of the assignment before the order of attachment was issued; but even if it had not, this is a contest between equities, and the equity created by the execution, acknowledgment and delivery of the deed of assignment is senior to the equity created by the order of attachment. (*Gen. Stats.*, chap. 24, sec. 10; *Rev. Stats.*, chap. 24, sec. 11; *Forepaugh, &c., v. Appold & Sons*, 17 B. M., 625-631; *Righter, &c., v. Forrester, &c.*, 1 Bush, 278; *Baldwin & Co., &c., v. Crow, &c.*, 86 Ky., 679; *Helm v. Logan's Heirs*, 4 Bibb, 78; *Campbell v. Mosby*, Litt. Sel. Cases, 358; *Graham v. Samuel*, 1 Dana, 166; *Morton v. Robards*, 4 Dana, 258; *Halley v. Oldham*, 5 B. Mon., 233; *Low & Whitney v. Blinco*, 10 Bush, 381; *Zaring v. Cox's Assignee*, 78 Ky., 529; *Citizens' Savings Bank v. Hibbs, &c.*, 11 Ky. Law Rep., 441; *Swigert v. Bank of Ky.*, 17 B. M., 268; *Bailey & Carter v. Welch*, 4 B. Mon., 244; *Russell v. Peters, &c.*, 10 B. M. 186.)
2. The deed of assignment was not fraudulent. (*Bank of United States v. Huth, &c.*, 4 B. M., 423; *Bank of Commerce v. Payne, Viley & Co., &c.*, 86 Ky., 446; *Moore, Bremaker & Co. v. Stege & Reiling*, 13 Ky. Law Rep., 948; *Christopher v. Covington*, 2 B. Mon., 358; *Vernon v. Morton*, 8 Dana, 263; *German Ins. Co. v. Nunes*, 80 Ky.,

The First Nat'l Bank of Covington v. The D. Kiefer Milling Co.

- 384; 5 Ohio St. Rep., 124; Deposit Bank of Carlisle, &c., v. Lee, &c., 18 Ky. Law Rep., 495.)
3. The right to an attachment under subsection 2 of section 194 of the Civil Code was not made out. (Burdett v. Phillips & Bro., 78 Ky., 246; Francis v. Burnett, 84 Ky., 23; Jenkins v. Jackson, 8 Bush, 373.)
 4. The bank was bound to know the provisions of the articles of incorporation limiting the right of the company to create debt, and can not be heard to disclaim such knowledge. (Morawetz on Private Corporations, vol. 2, secs. 579, 580, 581, 591, 592, 595, 600, 601; Sanford v. McArthur, 18 B. Mon., 411; Gen. Stats., chap. 56.)

CLEARY & HAMILTON OF COUNSEL ON SAME SIDE.

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

Prior to December, 1888, "The D. Kiefer Milling Company," incorporated under chapter 56, General Statutes, of which D. Kiefer was president and principal stockholder, had done a large and apparently profitable business; but by reason of the fraudulent conduct of George M. Kiefer, son of the president and secretary of the company, in discounting and receiving from The First National Bank proceeds, amounting to a large sum, of drafts purporting to have been drawn by the company, with which he fled the State, it was rendered insolvent; and December 31, 1888, a meeting of its directors and stockholders was held, when a deed of assignment was directed made and was executed by D. Kiefer, the president. But without delivering the deed to the assignee, D. Kiefer, with hope and purpose of continuing the business, proposed an arrangement with "The First National Bank of Covington," whereby his wife was to furnish a large sum of money to enable the company to eventually pay its debts, and the bank was to advance a considerable sum to aid in carrying on the business in the meantime, about \$14,000 of which was actually paid. That arrangement was not, however, fully carried out, because D. Kiefer died January 5, 1889. And January 7, 1889, The First National

The First Nat'l Bank of Covington v. The D. Kiefer Milling Co.

Bank of Covington brought an action against The D. Kiefer Milling Company for judgment on numerous demands aggregating about \$77,000, seeking and obtaining at the same time an attachment for the second class of causes provided in section 194 Civil Code.

It appears plaintiff's petition was filed in the clerk's office, and the attachment issued and placed in the hands of the sheriff at 1:15 o'clock P. M. But the evidence shows that there was on the same day a meeting of stockholders of The D. Kiefer Milling Company, by whom W. S. Kiefer was elected president in place of D. Kiefer, deceased, and a resolution passed for execution of a deed of assignment for benefit of creditors. And in pursuance thereof a second deed was executed and acknowledged by W. S. Kiefer, president, and the secretary of the company, and delivered to the assignee about 9 o'clock A. M.; but the assignee, B. F. Graziani, did not lodge the deed for record until 2:45 o'clock P. M. of the same day, withholding it to await the result of a meeting with the president and directors of The First National Bank of Covington, which, it appears, was on January 5th, day of D. Kiefer's death, agreed to be held on January 7th. Subsequently a second action was instituted by the bank and another attachment obtained, which was consolidated and tried with the first. But, upon final hearing, both attachments were discharged, the deed of assignment adjudged valid and effectual, and proceeds of property conveyed, amounting to about \$30,000, directed to be distributed and paid *pro rata* to creditors of The D. Kiefer Milling Company, only the amount of \$30,000 of the \$77,000 claimed by The First National Bank being, however, adjudged to be thus ratably paid.

The First Nat'l Bank of Covington v. The D. Kiefer Milling Co.

The first question naturally arising is whether the deed of assignment is effectual for any purpose.

There is no evidence it was executed with any other intention on part of the grantors than to thereby secure a fair, legal and just distribution of the estate of The D. Kiefer Milling Company, then insolvent, among all its creditors. Nor do we think, as counsel argues, the deed is invalid by reason of the want of authority in W. S. Kiefer to make it as president, for the evidence shows there was a regular election by the stockholders, and he was duly chosen. Moreover, the summons on plaintiff's petition was served on, and a copy of the order of attachment was delivered by the sheriff to, W. S. Kiefer, as president of the defendant, which, it is to be presumed, was done by direction of the plaintiff.

As the second action was not commenced until after the deed was lodged for record, clearly the attachment in that case can not prevail. The reason stated by the lower court for discharging the attachment issued in the first action is that, although defendant did not, as stated in the petition, have property in this State subject to execution, or not enough thereof to satisfy the plaintiff's demand, the collection of it would not, as alleged, have been, in meaning of section 194 Civil Code, endangered by delay in obtaining judgment, or a return of no property found.

According to the language there used, the single fact a defendant has no property in this State subject to execution, or not enough thereof to satisfy the plaintiff's demand, is not sufficient to authorize an attachment; but the additional and independent fact that the collection of the demand will be endangered by delay in obtaining

The First Nat'l Bank of Covington v. The D. Kiefer Milling Co.

judgment, or a return of no property found, must also be alleged and shown. It was, it is true, held in *Burdett v. Phillips & Bro.*, 78 Ky., 246, that the two facts are concomitant, and the latter followed as a consequence of the former. But in *Francis v. Burnett*, 84 Ky., 30, the ruling in which is adhered to, it was held the Legislature evidently intended the latter to have an independent meaning, and that it did not always or necessarily follow that because the defendant did not have property enough subject to execution to satisfy plaintiff's demand, the collection of it would be endangered by delay in obtaining judgment or a return of no property found. But whether the plaintiff in this case did actually show existence of both facts we need not consider, because the judgment appealed from can and ought to be affirmed on another ground.

The deed of assignment having, as we think, been clearly executed with no fraudulent intent, the contest is between The First National Bank of Covington, seeking, in virtue of attachment, to absorb the entire estate of the insolvent company, and other creditors claiming under the deed a *pro rata* distribution as provided by statute.

Section 10, chapter 24, General Statutes, is as follows: "No deed of trust or mortgage conveying a legal or equitable title to real or personal estate shall be valid against a purchaser for a valuable consideration without notice thereof, or against creditors, until such deed shall be acknowledged or proved, according to law, *and lodged for record.*"

The evidence shows the deed of assignment was duly executed, acknowledged and delivered to the assignee, and he thus acquired an equitable title to the estate before plaintiff commenced its action, or the order of attach-

The First Nat'l Bank of Covington v. The D. Kiefer Milling Co.

ment was issued; and as, according to repeated decisions of this court, a creditor acquires by attachment only a lien upon, or an equitable right to, property levied on, it necessarily follows that we have in this case simply a contest between equities; and applying the doctrine that in such state of case the equity which is prior in time must prevail, there is no other alternative but to decide that the deed of assignment in this case prevails against the attachment. Such has been the construction and application so often given by this court to the statute quoted that it is needless to even cite the cases.

It appears that there was in the articles incorporating "The D. Kiefer Milling Company," a provision that the company should not, in any event, incur any liability or indebtedness in the aggregate in excess of one-half its capital stock *bona fide* subscribed, which was \$60,000.

The articles of incorporation were, as required by statute, recorded, and, independent of presumed notice by The First National Bank of Covington, of the provision in regard to the limit of indebtedness The D. Kiefer Milling Company was empowered to contract, it is a well settled rule that a person dealing with a corporation must, at his peril, take notice of its charter or articles of incorporation. (See Morawetz on Private Corporations, volume 2, sections 591, 592.)

Whether if this was simply a contest between the bank and the milling company, violation and disregard by the latter of the provision of the articles of incorporation would be a sufficient defense, we need not determine; but the enforcement of that provision is demanded by the assignee for benefit of other creditors, who have been prejudiced by the unauthorized and illegal dealing of the

Caperton, &c., v. Humpick.

bank with an unfaithful officer of the milling company, whereby its insolvency was precipitated, if not actually caused; and, in such case, a participant in the fraudulent transaction, not other innocent creditors, should suffer.

The judgment is affirmed.

CASE 18—PETITION EQUITY—NOVEMBER 2.

Caperton, &c., v. Humpick.

APPEAL FROM LOUISVILLE CHANCERY COURT.

95	105
111	527
95	105
123	300

DEDICATION OF STREET—LIABILITY FOR COST OF IMPROVEMENT.—

Although each of several deeds of partition of a tract of land provided that "it is distinctly understood and agreed between the parties to these deeds that the calls and descriptions of streets and alleys herein contained, so far as such streets and alleys have not been heretofore opened and established, shall not be construed, as between the parties hereto of the one part and the city or the public of the other part, to be a dedication of such streets and alleys," yet, as the city has at great expense constructed a bridge across a creek at its intersection with one of the streets designated in the deeds of partition, and on a map recorded therewith, and the street has been improved, without any effort on the part of the owners of the land bordering thereon to enjoin the construction of the bridge or the improvement, full benefit and enjoyment of which they and their vendees have and will continue to have, a dedication of the street must be implied; and the owners of the several quarter squares bordering on the improvement must pay therefor. A mere objection by defendants to the improvement, or notice to the contractors that they would not contribute to pay therefor, was not sufficient to exonerate them from liability, as good faith required, if they did not intend to avail themselves of the improvements and thereby impliedly dedicate the street, that they should institute legal proceedings to enjoin their construction.

HUMPHREY & DAVIE FOR APPELLANT.

1. Breckinridge street had not been dedicated as a public street when the contractor did this work; nor was the property sought to be charged situated within a square bounded by streets; and, for each of these

Caperton, &c., v. Humpick.

reasons, this tax can not be enforced against the property owners. (*Preston v. Roberts*, 12 Bush, 570.)

2. The evidence shows there had never been any dedication or grant by the property owners of this land called Breckinridge street, as a public street. The filing of a map, showing streets laid off, is not a dedication, if it contains a reservation showing that it was not thereby intended to dedicate. (*Niagara Falls v. Bachman*, 66 New York, 261.)
3. The use of this strip, called a "street," by the public driving over it for three or four years, without objection from the owners, did not amount to a dedication of it as a street; but was a mere license. (*West Covington v. Ludlow*, 12 Ky. Law. Rep., 784; *Sanford v. Covington*, 12 Ky. Law. Rep., 450; *Niagara Falls Co. v. Bachman*, 66 New York, 261.)
4. A citizen is not estopped from defending against a street assessment, merely because he did not sue the contractor for trespass, or enjoin him, when he commenced to work on the land. The contractor was bound to inquire whose land it was before commencing work; and acted at his peril in working without inquiry. It is no ground for estoppel against a taxpayer that he did not enjoin the contractor in advance.
5. The landowners in this case notified the city, before the work began, that there had been no street dedication, and forbade the improvement; and this notice was disregarded by the city and its contractor.

LANE & BURNETT FOR APPELLEE.

1. It is a rule to which no exception attaches that the sale and conveyance of a lot described by reference to a map or plan makes such map or plan a part of such deed of conveyance and operates as an express call for every easement, appurtenance, street and alley appearing on the map or plan, and amounts to an immediate and irrevocable dedication to the public of every street and alley delineated on such map or plan. (*Rowan v. Portland*, 8 B. M., 235; *Memphis v. Gray*, 9 Bush, 187; *Schneider v. Jacob*, 86 Ky., 105; *Carter v. Portland*, 4 Oreg., 845.)
2. The right to have all the streets and alleys referred to and set out in a plan remain public becomes a vested right in the purchaser of a lot according to and in the limits of the plan. (*Winona v. Huff*, 11 Minn., 114; *Huber v. Gazley*, 18 Ohio, 18; 2 *Smith's Leading Cases*, 181; *Rowan v. Portland*, 8 B. M., 232; *Logansport v. Dunn*, 8 Ind., 878; *Dubuque v. Maloney*, 9 Iowa, 450; *Demopolis v. Webb*, 87 Ala., 663; *Godfrey v. Alton*, 12 Ill., 29; *Church v. Hoboken*, 83 N. J. L., 18; *Lamar v. Clements*, 49 Texas, 347; *Stone v. Brooks*, 35 Cal., 489; *Cook v. Burlington*, 80 Iowa, 94; *Wiggins v. McCleary*, 49 N. Y., 346; *Davis v. Salita*, 63 Pa. St., 90; *Barclay v. Howell*, 6 Pet., 498; *Arrowsmith v. New Orleans*, 24 La. Ann., 194; *Field v. Carr*, 59 Ill., 198; *Herman on Estoppel*, chap. "Dedication"; *Angell on Highways*, sec. 149; *Detroit v. Railroad*, 23 Mich., 173; *Evans v.*

Caperton, &c., v. Humpick.

Evansville, 87 Ind., 229; Baker v. Johnson, 21 Mich., 819; Parsons v. Trustees, 44 Ga., 529; Patterson v. Duluth, 21 Minn., 493.)

3. Even conceding that the deeds of December 30, 1869, and the recorded plat did not amount to a dedication of a street or alley shown on that plat that had not prior to that date been opened or established, the reference to the maps in the subsequent deeds made it as much a part of each of those deeds as if it had been bodily incorporated into and expressly made a part of each deed, and it amounted to a representation by the several grantors that every street and alley shown or delineated on that map was, as shown by it, a public street and alley.

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

Appellee Humpick, a contractor, brought this action to enforce a lien on certain land to pay for improvement of what is called Breckinridge street, between Underhill and Vine streets, done by him under an ordinance of the General Council of Louisville. The land assessed to pay for the improvement, and upon which the lien is claimed, is composed of quarter squares between Breckinridge and Caldwell and Dupuy streets, situated north, and between it and Lampton and Vine streets, south. And the only issue that seems to be involved, or that counsel argue, is whether that part of Breckinridge so improved is a public street.

It appears that James Guthrie owned and devised a body of land, within boundary of which are the improvement and also the quarter squares, to his daughters, Ann A. Caldwell, Sarah J. Smith and Mary E. Caperton.

It further appears that, December 30, 1869, the three devisees, their husbands uniting, divided the land and executed deeds of partition. The various parcels allotted and conveyed to each partitioner were described and bounded in the deeds by streets and alleys, all those streets mentioned, including Breckinridge, being designated by name, as were other parallel streets, north and

south of Breckinridge, as well as streets that intersected it. There was also made and recorded with the deeds a map of the entire tract devised, called and recognized in each deed as "Guthrie's Southeastern enlargement to the city of Louisville." Upon that map is shown not only the relative position of the various streets, alleys and squares within the boundary of the original tract, but each block or square appears to have been subdivided into lots that are numbered. We therefore think the intention to dedicate Breckinridge, as well as all the other streets referred to, for use of the public would be manifest but for the following clause contained in each deed: "But it is distinctly understood and agreed between the parties to these deeds that the calls and descriptions of streets and alleys herein contained, so far as such streets and alleys have not been heretofore opened and established, shall not be construed, as between the parties hereto of the one part and the city or the public of the other part, to be a dedication of such streets and alleys so not heretofore opened or established. But said property is now laid off by squares and blocks bounded by said so called streets and alleys, as shown in the plat herewith recorded and as herein called for, for the convenience of fair and equal divisions and in anticipation of the extension of the city to the lands herein described; and as between the parties they shall be severally entitled to use the said spaces called streets and alleys as outlets and easements in the proper use and enjoyment of their several parcels." Although the streets within boundary of the original tract that had previous to the partition been opened and established were not designated in the deeds, we will assume that Breckinridge street was not one of them.

But the division was made and partition deeds executed in evident anticipation that all the streets and alleys would in time become subject to use of the public; and besides, it was manifestly understood by the partitioners that a sale and conveyance by any one of them of a lot or parcel of the land would give to the vendee and, as a necessary consequence, to the public, use of the street or alley upon which such lot or parcel might abut.

The improvement of Breckinridge street, for which plaintiff in this case seeks payment, was made more than twenty years after execution of the deeds of partition; and in the meantime the city had extended to and even beyond the original tract; each one of the partitioners had sold and transferred title and possession of many lots within boundary thereof; cisterns and wells had been made at expense of the city in streets even farther out than where the improvement in question was made; and a bridge over South Beargrass, where Breckinridge street crosses it, had been erected at a cost of \$40,000 to the city, whereby a convenient outlet from lots, not before existing, was afforded, benefit of which appellants have for several years enjoyed.

It is, however, argued by counsel that inasmuch as during the progress of the improvement appellee was notified by appellants they would not pay or contribute to pay therefor, he is not now entitled to any compensation. But no objection was made to construction of the bridge and approaches to it, nor does it appear that appellants have declined to use either it or the improvement of Breckinridge street, full benefit and enjoyment of both which they and their vendees have and will continue to have. If Breckinridge was not at the time a public street,

Lacey v. Lacey.

then the contractor who built the bridge as well as appellee who made the improvement were simply trespassers, and appellants might have, by legal proceedings, stopped construction of both, and it seems to us good faith required them to do so, if they did not intend to abide by and avail themselves of the benefit thereof, and thus impliedly dedicate the street if not directly.

In our opinion the facts and circumstances of this case are such as to imply a dedication of Breckinridge between Underhill and Vine streets, and to impose upon appellant the duty of paying for the improvement.

Judgment affirmed.

CASE 19—PETITION EQUITY—NOVEMBER 2.

Lacey v. Lacey.

APPEAL FROM WOLFE COURT OF COMMON PLEAS.

95	110
105	638
95	110
136	74

1. **THE WIFE'S RIGHT TO ALIMONY** is not confined to cases in which the divorce is obtained in a suit instituted by her, although a strict construction of the statute would seem to so limit the right. The statute was intended to apply in all cases where the separation occurs without the wife's fault, and embraces cases where she is entitled to obtain a divorce, although the husband is seeking it.

In this action by the husband for a divorce upon the sole ground of his having lived apart from his wife without cohabitation for five consecutive years next before the institution of the action, as the wife might have obtained the divorce by making the application, she, being without fault, was entitled to alimony.

2. **COUNTER-CLAIM.**—The objection that the wife's answer seeking alimony was not styled a "counter-claim," was waived by the plaintiff by replying and joining issue on the matter set up in the alleged counter-claim, if the requirement of the Code be applicable to cases of this kind.
3. **ALIMONY.**—Even if the statute does not allow alimony to the wife in the action instituted by the husband for a divorce, because it would

Lacey v. Lacey.

not be on a divorce obtained by her, or if the objection to the counter-claim was not waived, yet she is entitled to alimony in an independent suit brought by her for that purpose after the husband instituted his action, the two suits being consolidated and heard together.

4. **SAME.**—The only allowance to the wife was \$75 pending the suits. The extent of her estate seems to be about \$700. The husband seems to have gotten several hundred dollars of her separate property, and is worth \$2,500 or \$3,000. *Held*—That the wife should have been allowed as alimony the sum of one thousand dollars.
5. **PARTIAL TRANSCRIPT.**—Although an amended petition was tendered and an order made permitting it to be filed, yet as it is not in fact in the record, which is certified to be a complete transcript, the presumption must be that although the plaintiff had permission to file it, it was not in fact filed.

THOMAS H. HINES FOR APPELLANT.

The wife is entitled to alimony, although she did not institute the action for divorce. Sec. 6 of art. 8, chap. 52, Gen. Stats., applies only where the wife is in fault, and the grounds alleged by the husband are not sufficient if embraced in a petition by the wife to entitle her to a divorce. (*Davis v. Davis*, 86 Ky., 33.)

JO. M. KASH AND E. C. JOHNSON OF COUNSEL ON SAME SIDE.

WM. H. HOLT FOR APPELLEE.

1. A defendant is not entitled to judgment upon a claim attempted to be set up by way of counter-claim unless it be so termed. (Civil Code, sec 97, sub-sec. 4.)
2. The wife is not entitled to alimony except upon a divorce obtained by her. (Gen. Stats., p. 730.)
Davis v. Davis, 86 Ky., 33, distinguished.

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

The appellee sought and obtained a divorce from his wife, the appellant, on the sole ground of his having lived apart from her without cohabitation for five consecutive years next before the institution of his action. The fact of separation was not denied, but the wife sought alimony upon the ground that the appellee, without cause, had abandoned her when she was without fault; that she had sheltered him in a home provided by her for the nine years of their married life, and been

Lacey v. Lacey.

patient with his shortcomings; that she had very little property left, having been compelled, since his desertion of her, and in order to provide the means of subsistence, to sell her house and lot where they had lived during the marital relation; that her husband had appropriated to his own use some eight or nine hundred dollars belonging to her, which he had collected from a sale of a small tract of land inherited from her father's estate; that she was old and in feeble health, while her husband was strong, without children, or others dependent on him, and worth some four or five thousand dollars in real estate.

The appellee admits that he abandoned his wife, but denies that he was in fault, and sets up a series of petty grievances against her, evidently having little, if any, excuse for his conduct. He was about thirty-eight years of age and she forty-eight when they married in 1875. She was a widow with two daughters. They kept a boarding house, and the wife was industrious and economical. The husband was addicted to frequent sprees, but was a proficient salesman and clerk, and contributed to a considerable extent to the support of the family. In his deposition he says that while he was married he bought a town lot for \$150, and a small tract of land for which he paid \$200; that just before the separation he had bought a piece of land and owed a sale bond amounting to \$301, and was without money to pay it; that he told his wife and her daughter and son-in-law that if they would pay to him some \$245 that the son-in-law owed for board, he would stay at home and assist his wife in keeping the boarding house, otherwise he would be forced to leave in order to make money enough to pay

Lacey v. Lacey.

his debts; that they refused to let him have it and he left. We cite these alleged reasons given by the appellee to show the utter want of legal excuse for his abandonment, and except for the arbitrary statutory provision as to the separation for five years, it is evident the appellee would not have been entitled to the divorce.

The chancellor seems to have been of the opinion that because the divorce was not obtained by the wife in a proceeding by her for that purpose, she is not entitled to alimony, and such would seem to be the effect of a literal construction of the statute. It reads, "and if the wife have not sufficient estate of her own, she may, on a divorce *obtained by her*, have such allowance out of that of her husband as shall be deemed equitable," etc.

We do not think, however, that this statute deprives the wife of alimony, if otherwise entitled to it, simply because she may not have instituted the suit for divorce. It was intended to apply in all cases where the separation occurs without her fault, and embraces cases where she is *entitled to obtain* a divorce, though the husband is seeking it. Such was the effect of the decision of this court in *Davis v. Davis*, 86 Ky., 32. It is true that in that case the judgment of divorce obtained by the husband should not have been granted. Here it was properly granted by reason of the statute, yet the point upon which the right of the wife to alimony rested was the conduct of the husband. Her equities are the same in this case. Although either party, without reference to which one was in fault, might have obtained the divorce by making the application, yet their conduct was a proper subject-matter of inquiry for the purpose of

Lacey v. Lacey.

equitably determining and adjusting their property rights.

It is insisted, however, that because the wife's answer was not styled a "counter-claim," she is not entitled to a judgment for alimony. If this requirement of the Code be applicable to cases of this kind, yet the appellee by replying to and joining issue on the matter set up in the alleged counter-claim, waived his right to make this objection. (*Cason v. Cason*, 79 Ky., 558.) Moreover, after the institution of the suit of appellee, the wife instituted an independent action for alimony. There was an answer relying, among other things, on the pendency of the first action and the claim to alimony therein. This action could not be prosecuted independently of the first one, but the suits were consolidated and heard together. If we hold that the statute does not allow alimony to the wife in the first action because it would not be on a divorce obtained by her, or hold that the appellant did not waive objection to the wife's pleading by replying to it, yet there seems no reason why she is not entitled to alimony in this independent suit brought by her. It is urged as an objection to this, that only a partial record of this second suit is brought up; but when an amended petition is tendered and an order made permitting it to be filed, yet if it be not in fact in the record, which is certified to be a complete transcript, the presumption must be that although the plaintiff had permission to file it, it was not in fact filed.

The only allowance to the wife was \$75 pending the suits. The extent of her estate seems to be about \$700. The husband seems to have gotten several hundred dollars of her separate property, and is worth some

Piper v. Gunther & Sons.

twenty-five hundred or three thousand dollars. We think she should have been allowed as alimony the sum of \$1,000.

The judgment below dismissing her claim is reversed, and a judgment in her behalf is directed to be entered for this sum.

CASE 20—PETITION EQUITY—NOVEMBER 4.

Piper v. Gunther & Sons.

APPEAL FROM DAVEISS CIRCUIT COURT.

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SPECIAL ACTS OF THE LEGISLATURE REGULATING THE PRACTICE in the particular circuit courts under the old Constitution, except such courts as are in continuous session, stand unrepealed by the new Constitution until the Legislature shall pass a general law regulating the practice in circuit courts, no such law having yet been passed, except as to courts in continuous session. Therefore, an act of the Legislature regulating the practice in the Daveiss Circuit Court, and fixing the time at which cases shall stand for trial, is still in force.

LUCIUS P. LITTLE AND L. FREEMAN LITTLE FOR APPELLANT.

The special act regulating the practice in the Daveiss Circuit Court was not repealed by the new Constitution.

WEIR & WEIR FOR APPELLEES.

No brief in record.

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

By the provisions of an act of the General Assembly, entitled "An Act to regulate civil proceedings in actions in the Daveiss Circuit Court," the clerk of the court was required to keep an equity-trial docket in addition to the equity-docket provided for by general law. It was also provided "that no case should stand for trial or judgment unless set down on the trial-docket before the first day of

Piper v. Gunther & Sons.

the term at which trial or judgment was sought." The clerk was to so set the cause at the instance of any party to the action or his attorney.

The appellees brought this suit in the Daveiss Circuit Court to recover judgment on a purchase money note for a town lot, and to enforce their lien thereon. At the January term, 1893, the case was called and the plaintiffs moved for judgment. The defendant (appellant) objected upon the ground that the case did not stand for trial. It was conceded that the action had not been placed on the equity-trial docket, as provided by the special act. The court rendered a judgment in behalf of the appellees over the objection of the appellant, and also overruled his motion to set the same aside, made on the ground that its rendition was a clerical misprision. The appellant brings the case up, insisting that by reason of the special act mentioned the case did not stand for trial or judgment, and that the judgment complained of was rendered prematurely.

The appellees contend that by virtue of the present Constitution the special act affecting the practice in the Daveiss Circuit Court is no longer in force, and hence the judgment was properly rendered. The learned circuit judge has supported this contention—that the special act has been repealed—by an elaborate and somewhat plausible opinion, the purport of which is, that the court to which the act alone applied was created by virtue of the Constitution of 1850. This old Constitution has been superseded by the new, which, by its 125th section, creates a new circuit court in each county. The Daveiss Circuit Court, to regulate the practice in which the special act in question was passed, is not the Daveiss Circuit

Court now in existence under the new Constitution. Moreover, the third provision of the schedule is to the effect that circuit courts as now constituted and organized by law shall continue with their respective jurisdiction until the judges of the circuit courts provided for in this Constitution shall have been elected and qualified, and shall then cease and determine; and the causes then pending in the first-named courts, which are discontinued by this Constitution, shall be transferred, etc. The fallacy of this argument, it seems to us, lies in the assumption that because the old court, as constituted and organized, is discontinued, the law, whether special or general, regulating the practice is also discontinued.

These "practice acts," so to speak, do not form a part of the old courts, "as constituted and organized," in the meaning of the Constitution, and are not, therefore, discontinued simply because the old courts are discontinued. On the contrary, "that no inconvenience may arise from the alterations and amendments made in this Constitution," the first clause of the schedule provides, "that all laws of this Commonwealth in force at the time of the adoption of this Constitution, not inconsistent therewith, shall remain in full force until altered or repealed by the General Assembly," etc.

These various acts regulating practice are "laws of the Commonwealth." They are not repealed simply because the courts to which they relate are discontinued, as constituted and organized theretofore, but their repeal is made to depend on whether they are inconsistent with the new Constitution, and whether inconsistent or not is a question not involved in the argument at hand. This phase of the question will be considered further along.

The various acts or laws of the Commonwealth regulating practice in civil and criminal cases are independent of the organization or make-up of the courts created either by the new or old Constitutions. If it were otherwise, then laws regulating the subject of practice, whether general or special, would die with the old courts. The Civil and Criminal Codes are but acts regulating practice in civil and criminal cases. The provisions of this code (Civil Code, section 838) shall regulate pleadings and practice in civil cases commenced hereafter in courts which *now exist*, or which may hereafter be created—created, of course, under the Constitution then in force. Special acts, therefore, regulating practice in the courts under the old Constitution are no more repealed than is the Code of Practice. We think that all these acts survive the old Constitution, except such as are inconsistent with it; and, further, that where they are inconsistent with the Constitution, they still survive, provided the provisions of the Constitution making them inconsistent require legislation to enforce them. The only question is, therefore, is the special act under consideration inconsistent with any provision of the Constitution which is in force of itself, or is it operative without legislation to enforce it. The only provision on the subject relied on to show this inconsistency is that of section 59, providing that the General Assembly shall not pass local or special acts “to regulate the jurisdiction, or the practice, or the circuits of courts of justice, or the rights, powers, duties or compensation of the officers thereof; but the practice in circuit courts in continuous session may, by a general law, be made different from the practice of circuit courts held in terms.” This is a direc-

tion to future Legislatures and a limitation on future special legislation. It contemplates that the practice in circuit courts having stated sessions, as well as those having continuous sessions, shall be made uniform by general law, though the latter may differ from the former, after which it shall not be within the legislative competency to pass special or local acts regulating the practice, jurisdiction, etc., of the circuit courts.

The Legislature has provided the course of procedure in circuit courts having continuous sessions (chapter 124, Acts 1891-92-93, page 419), but no general law has as yet been provided for the other circuit courts. Until this shall be done, we think the special acts regulating the practice in these courts, as well as the general laws on the subject, stand unrepealed; and are in fact expressly continued in force by the first clause of the schedule.

The judgment below was prematurely rendered, and is reversed, with directions to set it aside and for proceedings consistent herewith.

CASE 21—INDICTMENT—NOVEMBER 16.

Commonwealth v. Day.

APPEAL FROM FLEMING CIRCUIT COURT.

1. **PROHIBITORY LIQUOR LAW CONSTRUED.**—Where a prohibitory liquor law provides that it shall not apply "to a regular resident practicing physician who in good faith prescribes liquor to his patient," and then provides that "any physician who shall furnish spirituous, vinous or malt liquors to any person except as a medicine, shall be fined one hundred dollars for each offense," the latter provision must be regarded as providing merely for the punishment of the offense of "prescribing" liquors for other than medicinal purposes; a physician who "furnishes" liquor to another to be drunk as a beverage being subject to the punishment prescribed for "any person" who shall "sell, barter, give, loan or traffic" in spirituous, vinous or malt liquors. Therefore the act is not liable to the objection that it prescribes for the same offense one punishment as to physicians and a different and severer punishment as to all other persons.
2. **SAME.**—Authority to the physician to prescribe liquors gives to the druggist, but to no other person, implied authority to fill the physician's prescription.
3. **SAME.**—Each sale or prescription must be accompanied by a distinct prescription, and a person can not obtain such liquors from the druggist or physician on a prescription indefinite as to quantity or so general as to cover future deliveries.
4. **SAME.**—Although the act provides that one person shall not procure such liquors for another to be used as a beverage, one person may act as the agent of another in having a prescription filled. The sick man to whom the prescription is given is not required to go after the liquor in person.
5. **SAME.**—When such a law provides by its first section that "it shall be unlawful for any person to sell, barter, give, loan or traffic in spirituous, vinous or malt liquors," and by a subsequent section provides that "the procuring for or delivery by one person of liquor to another, unless a member of the same family, or their invited guests at their own household, to be drunk as a beverage, shall be deemed a sale under the provisions of the first section of the act, and subject the party procuring or delivering the same to the penalties annexed for a violation of said section," the latter section is not to be regarded as a limitation upon the first section, but as an addition to it, and as providing for the punishment of one who procures such liquors for, or delivers them to, another, to be drunk as a beverage, although he may

Commonwealth v. Day.

not sell, barter, give or loan such liquors, or traffic in them, within the ordinary meaning of those terms.

**W. J. HENDRICK, ATTORNEY-GENERAL, AND JAMES H. SALLEE
FOR APPELLANT.**

1. Under the Fleming county prohibition law only a druggist can sell liquor upon the prescription of a physician and only one sale can be made on each prescription. (*Commonwealth v. Reynolds*, 89 Ky., 147; *Parker v. Commonwealth*, 11 Ky. Law Rep., 454.)
2. The act in question does not enlarge the rights and privileges of the distillers, but on the contrary abbreviates them. (*Stickrod v. Commonwealth*, 86 Ky., 285.)
3. The Legislature has the constitutional right to regulate the sale by retail of intoxicating liquors, or to absolutely prohibit its sale, whenever the peace and good order of society require it. (*Sarris v. Commonwealth*, 83 Ky., 327; *Anderson v. Commonwealth*, 13 Bush, 485.)

W. G. DEARING AND G. A. CASSIDY FOR APPELLEE.

1. The law known as the Fleming County Prohibition Law was never legally passed because it was never read the first time, as appears from the House journals, of which the court should take judicial notice.
2. A druggist can sell on prescription. (*Commonwealth v. Reynolds*, 89 Ky., 147.) If he can, why not any other person? The law should not discriminate.
3. The clear intent of the act is to prevent a sale of liquor to be drunk as a beverage, and as the appellee sold for medicinal purposes he has not violated the law.
4. The law is not constitutional because it discriminates as to penalty, a physician being subject to a fine of only one hundred dollars while all other persons are subject to a fine of from one to three hundred dollars. (*Miss. v. Lewis*, 101 U. S., 22; *Cooley's Const. Limit.*, p. 14 and note at bottom of page; *Const. of Ky. (1850)*, art. 18, sec. 1; *Const. of Ky. (1891)*, sec. 3.)

A. E. COLE & SONS ON SAME SIDE.

1. The Fleming county prohibition law does not require the seller to have a prescription each time there is a sale.
2. The object of the law was to prevent the use of intoxicants as a beverage and not to prevent its use for medicinal purposes. (*Acts 1886*, vol. 2, pp. 17, 18.)
3. The act is unconstitutional because it discriminates as to penalty. (*Const. of Ky. (1850)*, art. 18, sec. 1; *Const. of Ky. (1891)*, sec. 3.)

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

We are asked by the learned attorney-general to

extend the opinion in this case, and by a construction of the act in question to settle the law regulating the sale of liquors in Fleming county. The act provides—

1. That it shall be unlawful for any person to sell, barter, give, loan or traffic in spirituous, vinous or malt liquors in any quantity whatever, within the county of Fleming, except as hereinafter provided.

2. This act shall not apply to the procuring or use of wine for sacramental purposes, or to a regular resident practicing physician, who, in good faith, prescribes the same as a medicine to his patient or patients, or to a sale from a distillery in the county by the owner thereof or his agent, at any one time in a quantity not less than ten gallons, and then not to be drunk on the premises where sold or premises adjacent thereto.

3. Nor shall this act or its provisions apply to those who give or furnish spirituous, vinous or malt liquors to a member or members of their own family, or their invited guests at their own household.

4. Any person violating the provisions of the first section of this act shall be fined not less than one hundred nor exceeding three hundred dollars, etc.

5. Any physician who shall furnish spirituous, vinous or malt liquors to any person or persons, except as a medicine, shall be fined one hundred dollars for each offense, to be recovered, etc.

6. The procuring for or the delivery by one person of liquors to another, unless a member of the same family, or their invited guests at their own household, to be drunk as a beverage, shall be deemed a sale under the provisions of the first section of this act, and subject the party pro-

curing or delivering the same to the penalties annexed for a violation of said section.

Then follow other sections providing for a vote and the enforcement of the provisions of the act by the county officers, etc.

It is contended by the appellee (1) that the act is unconstitutional, because it imposes a different penalty on physicians for furnishing liquors than on other persons. But we think that different penalties for the same offense are not intended to be imposed. The letter of the act, it is true, imposes the penalty of \$100 on the physician who shall "furnish" such liquors, and of from \$100 to \$300 on other persons furnishing the same. But it is evident that the offense attempted to be provided against in the fifth section as to physicians is that of prescribing liquors save as a medicine. We do not doubt that if a physician furnishes such liquors to another, to be drunk as a beverage, he would be punishable under the fourth section as other persons. He is excepted from the act only when he "in good faith prescribes the same as a medicine." If he prescribes it to be used otherwise than as a medicine, he is punishable under the fifth section. (2) The appellee insists that the sixth section is a limitation on the first section; that "the procuring for or the delivery by one person of liquors to another, to be drunk as a beverage, constitutes the selling, bartering, giving and loaning as designated in the first section, and such liquors must be sold, bartered, given, loaned, that is, procured for and delivered to another, to be drunk as a beverage, before there can be an infraction of the law.

This contention is not without plausibility, and if the sixth section is to be regarded as a limitation on the first,

and "the procuring for or delivery by one person of liquors to another" is to be regarded as constituting the sale, barter, gift and loan mentioned in the first section, then, as a chain can not be stronger than at its weakest point, the important modification found in the sixth section, "to be drunk as a beverage," must be regarded as qualifying the act of furnishing such liquors as denounced in both the first and sixth sections. Not the distiller alone, therefore, or the merchant, or the grocer, or the druggist may furnish such liquors; but any person may do so, provided they are not furnished "to be drunk as a beverage."

Of course, if this be the proper construction of the act, it should not argue against its adoption by us, that sales of liquors for medicinal purposes, and not to be drunk as a beverage, would increase rapidly in that hitherto healthy locality, although it must be admitted that if the patient may diagnose his own ailment, and the liquor dealer prescribe the remedy, the act would soon permanently fall into a state of "innocuous desuetude." But we are convinced such is not the meaning of the language of the act, nor is it in accord with its spirit.

The first section stands without modification or limitation. Whoever sells, barter, gives, loans or traffics in spirituous, vinous or malt liquors in any quantity in Fleming county does an unlawful act, unless he is a physician and prescribes such liquors as a medicine, or a distiller and sells in the quantity designated by the act, or unless he gives them to his family or to his invited guest, or furnishes wine for sacramental purposes, or as a druggist fills the prescription of a physician. But more than this—in addition to and independent of such selling,

giving, etc., whoever—though he may not sell such liquors or barter, give, loan or traffic in them, yet whoever procures such liquors for, or delivers them to, another to be drunk as a beverage—whether he be the accommodating stage-driver who, without selling, giving, loaning or trafficking in such liquors, yet loads his coach down with the “irrepressible jug,” the unvarying accompaniment of stringent liquor laws, or be the special messenger sent in his carry-all with orders to the nearest “wet” town—is guilty under the sixth section of this act. He is the go-between who sells not, or gives, or loans, or traffics in such liquors, yet he procures them for and delivers them to another to be used, not as a medicine, but as a beverage, and he it is that the sixth was aimed at. The ambitious purpose of the act, as indicated in its sixth section particularly, was to prevent absolutely the importation of spirituous, vinous or malt liquors into the county for use as a beverage. While the act does not make it unlawful for a man to take a drink of such liquors in the county, and indeed graciously allows him to give them to his family and even to his guest, if at his household by his invitation, yet the law provides that no one may procure such liquors for him or deliver them to him unless the distiller does so by the quantity. They can not otherwise be procured for or delivered to him to be used “as a beverage.” This seeming restraint on the personal liberty of the citizen is self-imposed, and its constitutionality is maintainable on abundant authority in this and other courts of the country. It is noticeable that while the act permits the physician to prescribe such liquors as a medicine, it nowhere authorizes anyone to fill the prescription; but in the Reynolds case (89 Ky., 147), this court,

looking to the reasonable intent and not the letter of this act, held that a druggist might fill the prescription of the physician. It was there said that "the settled policy of the State, in the effort to control the liquor traffic, has been to confine the sale in small quantities to druggists and physicians, to be used as a medicine," which is a sufficient answer to the question asked by counsel in this case, "If a druggist may fill a prescription, why may not any other person do so?" It is not the policy of the law, and certainly not in accord with common reason, that the unskilled and non-professional may decipher the enigmatical *prescription* of the erudite doctor! And certainly is he not to be intrusted with such enticing responsibility when it comes to filling a prescription for spirituous, vinous and malt liquors!

When we speak of the intent or spirit of the act, we must be understood as meaning the legislative intent. The intention of zealous framers of this act was no doubt to confine the furnishing of liquors, as well as its prescription, to the physician. They do not use the term druggist in the act, or affect to know even of the existence of the art of the pharmacologist; but to render its arbitrary features tolerable and to remove constitutional objections the courts must construe liberally the act as a whole, though we can not extend its meaning beyond legitimate and reasonable limits.

Therefore (1) the distiller can not fill the physician's prescription—much less could he sell without it—or dispose of his product otherwise than as permitted by the act.

(2) No other person than the physician or druggist can

sell, barter, give, loan or traffic in such liquors, in any quantity whatever, with or without a prescription.

(3) Nor can a person by importation or otherwise, as agent or servant, or as a "go-between," procure for or deliver to another such liquors to be used as a beverage, though such person may, with a prescription prescribed in good faith by a physician, procure such liquors from the physician or druggist to be used as a medicine. The sick man need not go after the liquor in person.

(4) Each sale or procurement must be accompanied by a distinct prescription, and a person can not obtain such liquors from the druggist or physician on a prescription indefinite as to quantity, or so general as to cover future deliveries.

We think these views substantially cover the case at hand and the points raised by learned counsel. If some of the features of this act seem harsh or arbitrary, it is to be remembered that "the way to kill a bad law is to enforce it!" This construction is directed to be certified as the law of the case.

 Johnson, &c., v. Stivers, &c.

CASE 22—PETITION ORDINARY—NOVEMBER 18.

Johnson, &c., v. Stivers, &c.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

1. IN THE CONTEST OF A WILL upon the ground of want of testamentary capacity on the part of the testatrix, and of undue influence on the part of the devisees, letters written by the testatrix to one of the devisees were competent evidence to show her feelings to the devisee to whom they were addressed, and her intimacy with her.
2. THE BURDEN WAS ON THE PROFOUNDERS OF THE WILL to show by a preponderance of evidence that the testatrix was of testamentary capacity, and on the contestants to show by a preponderance of testimony that she was unduly influenced or coerced.
3. NEWLY DISCOVERED EVIDENCE which was not of a decisive or controlling character did not authorize a new trial.
4. TIME FOR FILING A BILL OF EXCEPTIONS can not be extended beyond the term succeeding that at which the motion for a new trial is overruled.
5. TERMS OF LOUISVILLE COURTS.—As the Jefferson Court of Common Pleas and Louisville Chancery Court have such control over their judgments for sixty days as circuit courts have over their judgments during the term in which they are rendered, the period of sixty days from the entry or rendition of any order or judgment in these courts is to be regarded as a "term" as to that particular order or judgment. Therefore the time for filing a bill of exceptions in the Jefferson Court of Common Pleas can not be extended beyond one hundred and twenty days from the entry of the order overruling motion for new trial.

A motion for new trial was overruled June 24, 1889. Time was given until September 30 to file bill of exceptions, and by successive orders time was further extended to November 18, when bill was tendered, but the bill was not filed until December 4, time being given until then to "complete" the bill. *Held*—That the term succeeding that at which the motion for new trial was overruled ended October 22, and therefore the bill tendered for the first time on November 18 was too late to be considered.

ABBOTT & RUTLEDGE FOR APPELLANTS.

1. The verdict is palpably against the evidence.
2. The letters admitted as evidence over the objections of appellant were incompetent.
3. The court erred in instructing the jury that the burden was on the contestants to establish undue influence. (Civil Code, sec. 526; *Idem*, sec. 817, subsec. 6; *Lyman v. Campbell*, 88 Ala., 469; *Harrel v. Harrel*, 1 Duv., 208.

Johnson, &c., v. Stivers, &c.

4. It was improper for the court to instruct the jury upon whom the burden of proof rested, the term "burden of proof" being a technical term and calculated to confuse a jury. (*Fletcher v. Wilburn M'f'g Co.*, 35 Mo. Ap., 829; *Hawkins v. Grimes*, 13 B. M., 269; *Foley v. Alkire*, 52 Mo., 817; *Barnett v. Com.*, 84 Ky., 449; *Jump v. Com.*, MS. Op., May 31, 1884.)
5. The bill of exceptions was filed in time. (*Acts 1886*, vol. 1, p. 101; *Downing v. Bacon*, 7 Bush, 684.)

HUMPHREY & DAVIE AND SAM CLEAVER FOR APPELLEES.

1. The bill of exceptions, not having been tendered within one hundred and twenty days after the motion for a new trial was overruled, can not be considered. (*Acts 1865*, vol. 1, p. 52; *Acts 1867*, vol. 1, p. 35; *Acts 1865-6*, p. 26; *Code*, secs. 337, 772, 836; *Bailey v. Villier*, 6 Bush, 27; *Downing v. Bacon*, 7 Bush, 680; *Longest v. Tyler*, MS. December, 1876; *Byers v. Louisville Mail Line*, 5 Ky. Law Rep., 684; *Black v. Keiser*, 11 Ky. Law Rep., 328; *Snyder v. Hessee*, 11 Ky. Law Rep., 433; *Cavanaugh v. Cochran*, 11 Ky. Law Rep., 855; *Shrader v. Wilhite*, 11 Ky. Law Rep., 954; *Cain v. Cain*, 12 Ky. Law Rep., 635; *Bannon v. Moran*, 12 Ky. Law Rep., 989.)
2. The failure to object to an extension of time would not extend the power of the court beyond the one hundred and twenty days. (*Smith v. Blakeman*, 8 Bush, 480; *Vandever v. Griffith*, 2 Met., 425; *L. & N. R. Co. v. Turner*, 5 Ky. Law Rep., 542; *City of Henderson v. Allen*, 10 Ky. Law Rep., 282; *Meaux v. Meaux*, 81 Ky., 477.)
3. After the bill is tendered, if the court takes further time to complete the bill, it is not fatal to the bill, if the court completes it in a reasonable time. (*Hughes v. Merritt*, 10 Ky. Law Rep., 1025; *Snyder v. Hessee*, 11 Ky. Law Rep., 433; *White v. Allen*, 10 Ky. Law Rep., 1025; *Meaux v. Meaux*, 81 Ky., 475; *McIlvoy v. Russell*, 8 Ky. Law Rep., 523; *Dodson v. Scott*, 8 Ky. Law Rep., 615; *Ray v. Grove*, 6 Ky. Law Rep., 786; *Arnold v. Hicks*, 5 Ky. Law Rep., 927.)
4. The letters from the testatrix to her devisee, Mrs. Stivers, were admissible as evidence to show the feelings of the testatrix toward her chief devisee. (*Fuller v. Fuller*, 83 Ky., 351; *Fee v. Taylor*, 83 Ky., 260; 1 *Greenleaf's Evidence*, sec. 108.)
5. The giving the last speech to the propounders was correct. (*Gen. Stat.*, chap. on Wills, sec. 27; *Fee v. Taylor*, 83 Ky., 259; *Porschett v. Porschett*, 82 Ky., 98.)
6. The "newly discovered" evidence was merely cumulative, and not sufficient to warrant a new trial; nor is it shown that due diligence could not have produced it at the trial. (*Mercer v. Mercer*, 87 Ky., 21.)
7. The failure of the contestants themselves to make all the heirs parties does not entitle them to a new trial. (*Gen. Stats.*, chap. on Wills, secs. 35 and 37.)
8. The verdict is not "palpably against the evidence," so as to warrant a

Johnson, &c., v. Stivers, &c.

new trial. The usual rule as to the weight to be given jury verdicts applies to will cases. (*Broadus v. Broadus*, 10 Bush, 800; *Fuller v. Fuller*, 83 Ky., 847.)

9. The instructions given were chiefly those asked by the contestants themselves, and they therefore can not be complained of as error. (4 Litt., 217; 2 Litt., 145; 4 J. J. M., 610.)
10. The instructions given by the court to the jury laid down correctly the law as to testamentary capacity and undue influence. (*Tudor v. Tudor*, 17 B. M., 391; *Wise v. Foote*, 81 Ky., 15; *Sherley v. Sherley*, 81 Ky., 249; *Fee v. Taylor*, 83 Ky., 259; *Secrest v. Edwards*, 4 Metcalfe, 178; 2 Minor's Institutes, 670.)

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

By the verdict of a jury in the Jefferson Court of Common Pleas, the paper in contest on this appeal was established as the last will and testament of Mrs. Sarah C. Stevens. The motion of the contestants for a new trial having been overruled, they bring the case here for review, alleging that the court erred in admitting incompetent testimony, and in instructing the jury. They also allege that the verdict is contrary to the law and the evidence, and that they ought to have been granted a new trial because of newly discovered evidence.

Without reviewing the evidence in detail, or discussing the instructions at length, it is sufficient to say—

1. That the evidence complained of was competent. The letters of the testatrix were competent to show her feelings toward Mrs. Stivers, and her intimacy with her; in a general way they bear on her mental capacity and disposition. (*See Fuller v. Fuller*, 83 Ky., 351; 1 Greenleaf on Evidence, sec. 108.)

2. The instructions of the court properly present the law of the case. The burden was on the propounders to show, by a preponderance of evidence, that the testatrix was of testamentary capacity, and on the contestants to show, by a preponderance of testimony, that she was

unduly influenced or coerced, as defined in other instructions. (See *Fee v. Taylor*, 83 Ky., 259; *Porschet v. Porschet*, 82 Ky., 93.) The other instructions conform to the law as laid down in *Wise, &c., v. Foote, &c.*, 81 Ky., 15; *Sherley, &c., v. Sherley, &c.*, 81 Ky., 240, and in *Bush v. Lisle*, 89 Ky., 401.

3. There is abundant evidence to sustain the finding of the jury. The verdict is not palpably or flagrantly against the weight of the testimony, though there is a conflict between that offered by the one side and that offered by the other. (See *Broaddus v. Broaddus*, 10 Bush, 300; *Fuller v. Fuller*, *supra*.)

4. The alleged newly discovered evidence is not of a decisive or controlling character. It is doubtful whether it would have had any preponderating influence upon another trial. (See *Mercer v. Mercer*, 87 Ky., 21.) Nor is it at all certain that by the exercise of reasonable diligence, the contestants could not have learned of the existence of the alleged new testimony before the trial. However, without regard to the errors alleged, the judgment must be affirmed.

The motion for a new trial was overruled on June 24, 1889. By appropriate orders time was given the contestants until September 30th to prepare and tender a bill of exceptions. On that day no bill was tendered, but over the objection of the propounders (appellees) the time was extended to October 14th. Then, on the contestants' motion, time was given them until October 28th, then it was extended to November 11th and finally to November 18th, on which day the contestants for the first time tendered a bill of exceptions. Time was then given them until November 25th to "complete" the bill, and on their

motion this was extended until December 4th, when they "tendered to the court a bill of exceptions which, being signed and sealed, was filed and made part of the record."

We think a brief examination of the law controlling the practice in this court will show that this bill can not be regarded as part of the record. The Jefferson Court of Common Pleas has no appearance terms, but it is provided that it "shall be always open." It is further provided that "it shall have the same power, and for the same length of time, over its judgments as the chancellor of the Louisville Chancery Court has over its judgments;" and the latter court has "such control over its judgments, for sixty days, as circuit courts have over their judgments during the term in which they are rendered." (Civil Code, sec 772.)

As to any given order or decree, therefore, the period of sixty days from its entry or rendition is to be regarded as a "term" in these courts. At the expiration of sixty days from the entry of the order or decree the term of court, so to speak, as applicable to this order or decree ceases, because the court loses control over it, just as the judge of a court having stated terms loses control over his orders after the term ceases. The beginning of the second sixty days, therefore, after the entry of a given order is the beginning of the succeeding term or the next term with reference to that order.

Now, the law governing the subject of exceptions, and applicable to all the courts, is found in the Civil Code, section 334. It provides that "the party objecting must except when the decision is made; and time may be given to prepare a bill of exceptions, but not beyond a day in the succeeding term, to be fixed by the court." An

Johnson, &c., v. Stivers, &c.

amendment to this section provides that, if the judge of said court, for any cause, does not preside, or no court is held, then time until the next term shall be had to perfect and prepare the bill.

If the first sixty days after the order overruling the motion of the contestants for a new trial is to be regarded as the term at which such order was entered, and the second sixty days is to be regarded as the succeeding term, then the first term would end sixty days after June 24th, which would be on August 23d. And the second sixty days, or the succeeding term, would end on October 22d. Therefore the bill, tendered for the first time on November 18th, was tendered beyond the succeeding term, or beyond the limit as fixed by law, and hence too late to be considered. We think it will be found that this construction of the acts regulating the practice in these courts has been followed both by this court and the Superior Court.

In *Cavanaugh v. Corekran, &c.*, 11 Ky. Law Rep., 855, the bill was tendered seventy-five days after the motion for a new trial was overruled. It was contended that such bill must be tendered within sixty days from the final order. But the Superior Court, through Judge Ward, held that "the reason and analogies of the law require that a second sixty days should be allowed, so that the court may by proper orders extend the term for filing bills of exceptions for one hundred and twenty days after the motion for a new trial has been overruled."

In *Shrader v. Wilhite*, 11 Ky. Law Rep., 954, the bill was not signed or filed until one hundred and forty-eight days after the new trial was *refused*. The same court held that "in the Jefferson Court of Common Pleas and the

Johnson, &c., v. Stivers, &c.

Louisville Law and Equity Court time for filing bills of exceptions may be extended for one hundred and twenty days after the order overruling the motion for a new trial, *but not beyond that time.*" Precisely to the same effect was the opinion (Judge Young) in *Cain, Adm'r, &c., v. Cain, Adm'r, &c.*, 12 Ky. Law Rep., 635, and in *Bannon v. Moran*, 12 Ky. Law Rep., 989-90, the court holding in each case that the time for filing a bill of exceptions in the Jefferson Court of Common Pleas or in the Louisville Law and Equity Court can not be extended, no excuse for the delay appearing in the record, beyond one hundred and twenty days after the order overruling a motion for a new trial.

. In the case under consideration some one hundred and forty-seven days elapsed from the time of making the order, overruling the motion for a new trial until the bill was first tendered. The cases of *Bailey v. Villier*, 6 Bush, 27, and of *Downing v. Bacon*, 7 Bush, 680, recognize the period of sixty days as equivalent to a term of these courts. In *Longest v. Tyler*, MS. opinion of this court December 22, 1876, it was held that by leave of the court upon proper extensions a party would have "from two to four months in which to file his bill of exceptions, and certainly no longer time should be demanded or required."

The appellants rely on the amendment to section 334 of the Civil Code, providing still further time for filing bills of exceptions, if the judge who can properly sign the bill does not preside, or no court is held, and say that the summer vacation, consuming some eighty-four days of the time, should not be counted against them; but court was in session from September 30th and there yet

Carder & Vallandingham v. Weisenhurgh.

remained nearly a month of the second sixty days, or "succeeding term," during which the judge did preside and there was a court held, so that the amendment does not aid the appellants. Its provisions are not applicable to their case. We think the true rule is laid down in the cases decided by the Superior Court, quoted above. The bill of exceptions must be disregarded. And with the bill out—even if inclined to a different conclusion with the bill in—the judgment below must be affirmed.

CASE 23—PETITION EQUITY—NOVEMBER 28.

Carder & Vallandingham v. Weisenburgh.

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128	710

APPEAL FROM GRANT COURT OF COMMON PLEAS.

1. **TRANSFER OF LEGAL ISSUES IN EQUITABLE ACTION.**—Where in an action brought in equity the equitable right depends upon the decision of legal issues, concerning which the party is entitled to a jury trial, the case on motion should be transferred as matter of right to the common law docket to be tried by jury. The court has no right to refuse such transfer unless the case be purely equitable, in which case it has discretionary power as to the transfer and may, at its discretion, obtain the advisory aid of a jury in coming to a correct conclusion upon any question of fact involved in the issues to be tried.

In an equitable action to enforce a lien on real estate for the cost of improvements in which the defendant pleaded by way of counterclaim the damages which he alleged he had suffered on account of breach of warranty as to the quality of the work, the defendant was entitled to have the case transferred upon his motion to the common law docket for the trial of the legal issues, the chancellor having no discretion in the matter.

2. **THE PROVISION OF THE CONSTITUTION GUARANTEEING THE RIGHT OF JURY TRIAL** means a trial according to the course of the common law, and secures the right only in cases where a jury trial was customarily used at common law. But in such cases the Legislature has no power to deprive a party of his right to a trial by jury by converting a legal right into an equitable one, or by giving the chancellor an exclusive

Carder & Vallandigham v. Weisenburgh.

right to try legal issues merely because there is some equitable right that arises out of the establishment of the legal issues.

COLLINS & FENLEY FOR APPELLANTS.

The action of the court in refusing to transfer the action to the ordinary docket for a trial of the "legal issues" by jury is a reversible error, the chancellor having no discretion. (Civil Code of Practice, sec. 12; Aulman & Co. v. Gibson & Co., 8 Ky. Law Rep., 62; Meek v. McCall, 80 Ky., 371; Hill v. Phillips' Admr., 87 Ky., 170; Walker v. Leslie, 90 Ky., 642; Hall v. Martin, 89 Ky., 9.)

C. C. CRAM AND JAMES T. WILLIS OF COUNSEL.**GEO. C. DRANE FOR APPELLEE.**

1. Section 12 of the Civil Code of Practice was not intended to confer or extend the right to demand a trial by jury in equitable actions so as to embrace every so-called legal issue of fact arising therein. (Civil Code (1877), secs. 312, 313; Former edition of Code, secs. 342, 343.)
2. At the time of the adoption of the present Civil Code of Practice litigants did not have, under the law as then existing, the right to demand a jury trial of all so-called legal issues of fact arising in equitable actions, but the power to order a jury trial was inherent in the chancellor, and therefore to be exerted at his discretion, and not as a duty imposed, and this power of the chancellor has not been taken away or abridged by the Constitution or written law of this State. (3 Am. and Eng. Enc. of Law, pp. 719-722; Proffatt on Jury Trials, secs. 91, 92, 93; 7 Lawson's Rights and Remedies, secs. 3791, 3792.)
Meek v. McCall, 80 Ky., 372, and Hill v. Phillips, 87 Ky., 169, distinguished.
3. The classification in Meek v. McCall and Hill v. Phillips of equitable actions as "purely equitable" and as "equitable and legal combined," is not recognized by the Code of Practice, or by the precedents of this court, or other courts of last resort. (Civil Code, sec. 313; Head v. Head, 3 A. K. Mar., 120; Baltzell v. Hall, 1 Litt., 98; Carmichael v. Adams, 91 Ind., 526; Cannon v. Blue Gravel & Co., 68 Cal., 264; Sheppard v. Steele, 43 N. Y., 52; Idaho & Or. Land Co. v. Bradbury, 182 U. S., 515.)
4. The amendment of April 29, 1890, to section 10 of the Civil Code of Practice, is constitutional, and is sufficient to support the action of the court in refusing to transfer.

CHIEF JUSTICE BENNETT DELIVERED THE OPINION OF THE COURT.

The appellee sued the appellants on their contract for the price of repairing and remodeling their flouring mill, and asked that a lien be declared and enforced on the

mill for the price; hence the suit was brought in equity. The appellants admitted the contract to repair and remodel the mill, but claimed that the work was not done in a workmanlike manner, and breach of warranty as to the quality of the work, and asked damages in consequence. The appellant, before the trial in equity, moved the court to transfer the legal issues thus framed to the common law docket to be tried by jury. The motion was overruled and the case tried by the court; from that judgment this appeal was taken. Did the lower court have a discretion to grant the motion or not? Or, should it have been granted as a matter of right? It is to be observed that the issues formed were legal issues and triable by jury, and that the only thing that gave a court of equity jurisdiction of the case is that a lien was sought to be enforced on the mill property for the price of the repairs. No lien could be enforced on the mill property except to satisfy the unpaid price of the repairs, the right to which was put in issue. That issue was a legal issue, triable by jury. Section 12 of the Civil Code provides in substance that either party to an equitable action, properly brought in equity, may, by motion, have the case transferred to the ordinary docket for the trial of any issue concerning which he is entitled to a jury trial, but either party may require every equitable issue to be disposed of before such transfer. Here, the matter that gave the court jurisdiction was the enforcement of a lien on the mill property to satisfy the price of the improvements, and if there was nothing due on account of the improvements, of course there was nothing for a court of equity to enforce. Hence, whether or not there was any sum due for repairing the mill was the legal

Carder & Vallandingham v. Weisenburgh.

issue to be tried. This court in the cases of *Meek v. McCall*, 80 Ky., 375, and *Hill v. Phillips, &c.*, 87 Ky., 169, has construed the 12th and other similar sections of the Civil Code as follows: That if the equitable right depends upon the decision of legal issues, concerning which the party is entitled to a jury trial, the case, on motion, should be transferred as matter of right to the common law docket to be tried by jury. The court has no right to refuse such transfer, unless the case be purely equitable, in which case it has discretionary power as to the transfer, and may, at its discretion, obtain the advisory aid of a jury in coming to a correct conclusion upon any question of fact involved in the issues to be tried. The Constitution of this State guarantees the right of jury trial. This means a trial according to the course of the common law, and secures the right only in cases where a jury trial was customarily used at common law; but in cases of purely equitable cognizance a trial by jury is not a matter of right, but it is addressed to the discretion of the chancellor. The right of trial by jury as secured to the citizen by the Constitution of the State, can not be taken away or placed at the discretion of the chancellor by converting a legal right into an equitable one, or by giving the chancellor an exclusive right to try legal issues, because there is some equitable right that arises out of the establishment of the legal issues, so as to infringe upon the right of trial by jury. That right must remain inviolate as a secured constitutional right of the citizen in all trials in which, according to the course of the common law, the right to a trial by jury exists.

The judgment is reversed, and the case remanded, with directions to award to the appellants a trial by jury.

Meier v. Flinsbach, &c.

CASE 24—PETITION EQUITY—NOVEMBER 28.

Meier v. Flinsbach, &c.

APPEAL FROM LOUISVILLE CHANCERY COURT.

1. **UNLAWFUL PREFERENCE BY INSOLVENT DEBTOR.**—Where a mortgagee releases his mortgage and accepts from the debtor, who is insolvent, a mortgage upon other property to secure not only the debt secured by the released mortgage, but also an additional amount advanced to the debtor simultaneously with the execution of the new mortgage, the latter mortgage does not operate as an assignment under the statute forbidding preferences by insolvent debtors, although it was executed in part to secure a pre-existing debt, there being no intention to prefer, and in fact no preference, the creditor getting no greater security than he had before.
2. **SAME—FAILURE TO LODGE MORTGAGE FOR RECORD WITHIN THIRTY DAYS.**—The mere fact that a mortgage executed by an insolvent debtor to secure a debt created simultaneously with its execution is not lodged for record within thirty days after its execution does not cause the mortgage to operate as an assignment under the statute, as the statute can not apply to any case unless there was a pre-existing debt. The proviso of the statute that nothing therein “shall vitiate or affect any mortgage made in good faith to secure any debt or liability created simultaneously with such mortgage, if the same be lodged for record within thirty days after its execution,” applies only where such a mortgage is executed after the debtor has committed some act to which the body of the statute applies, and in such a case the mortgage is valid, notwithstanding the prior involuntary assignment, provided it is lodged for record within thirty days after its execution; but otherwise it is not valid, as against the assignment, and in an action to have the prior act of preference declared to operate as an assignment the proceeds of the mortgaged property must be distributed among all the creditors.
3. **DEED TREATED AS MORTGAGE.**—Where, simultaneously with the execution of an absolute deed, it was agreed between the parties in writing, that the grantor was to effect a sale of the property within two years, and the grantee was not to sell it in the meantime, unless at a profit, which was to be divided between the parties to the transaction, and the grantee was at any time within the two years to deed back the property upon the repayment to him of the purchase price, the deed is to be treated as a mortgage.

O. A. WEHLE FOR APPELLANT.

1. An unrecorded mortgage is good between mortgagor and mortgagee and

Meier v. Flinsbach, &c.

- between the mortgagee and attaching and execution creditors of the mortgagor. (*Baldwin v. Crow*, 86 Ky., 680.)
2. A mortgage given only for a simultaneous loan is not a preference, though it remains unrecorded. (*Farmer v. Hawkins*, 79 Ky., 182.) See *Terrell v. Jennings*, 1 Met., 455; *O'Neil v. Miller*, 2 Bush, 295; *Heidrich v. Silva*, 89 Ky., 423; *Brooks-Waterfield Co. v. Staton's Adm'r.*, 79 Ky., 176.
 3. A transfer claimed to be a preference must be attacked as such directly in the petition. It can not be attacked by proof, when the petition attacks another transaction. (*Napper v. Yeager*, 79 Ky., 241; *Fuqua v. Ferrell*, 80 Ky., 69; *Southworth v. Casey*, 78 Ky., 397.)
 4. A mortgagee in bad faith within the meaning of the preference act is one who assists the debtor in preferring other creditors. (*McCann v. Hill*, 85 Ky., 581; *O'Neil v. Miller*, 2 Bush, 280; *Southworth v. Casey*, 78 Ky., 397.)
 5. A deed for an adequate price without any agreement of the grantor to refund the price nor of the grantee to reconvey does not become a mortgage by an agreement of the grantee to pay to the grantor the profit of a resale. Such agreement makes the sale a conditional sale and raises a trust in the profits. (*Holmes v. Grant*, 8 Paige, 243; *Honore v. Hutchings*, 8 Bush, 695; *Ogden v. Grant*, 6 Dana, 473; *Macauley v. Porter*, 71 N. Y., 178.)
 6. Such a deed will certainly be considered as a deed and not as a mortgage within the meaning of the recording laws between the grantee and a stranger. (*Macauley v. Porter*, 71 N. Y., 178.)

KOHN, BAIRD & SPECKERT AND GEO. L. EVERBACH FOR APPELLEES.

1. *Theodore Schwartz & Co.* were insolvent. (*Commonwealth v. Schwartz*, 13 Ky. Law Rep., 929.)
2. If the act complained of was a preference, then the intent to prefer is plain in this case. (*Grimes v. Grimes*, 86 Ky., 511; *Hoffman v. Brungs*, 83 Ky., 406; *Terrell v. Jennings*, 1 Met., 452; *Drake v. Ellman*, 80 Ky., 434.)
3. The transfers to *Robert Meier* were mortgages. (*Pomeroy's Eq. Jur.*, sec. 1195; *Jones on Mortgages*, vol. 1, secs. 264, 266, 274, 271 and 279; *Am. and Eng. Ency. of Law*, vol. 15, p. 783 and notes; *Skinner v. Miller*, 5 Litt., 85; *Bright v. Wagle*, 8 Dana, 258; *Edrington v. Harper*, 3 J. J. Mar., 354; *Honore v. Hutchings*, 8 Bush, 687; *Oldham v. Healey*, 2 J. J. Mar., 113; *Blanchard v. Kenton*, 4 Bibb, 457; *Murphy v. Trigg*, 1 Mon., 72; *Stapp v. Phelps*, 7 Dana, 296; *Bright v. Taylor*, 3 Dana, 252; *Perkins v. Dye*, 8 Dana, 170.)
4. The lien of creditors, under the act of 1856, relates back to the time of the commission of the preference and overreaches subsequent liens. (*Shouse v. Utterback*, 2 Met., 53; *Givens v. Gordon*, 8 Met., 539; *Drake v. Ellman*, 80 Ky., 438.)

Meier v. Flinsbach, &c.

5. An unrecorded mortgage is ineffectual against creditors acquiring a right before notice. (*Helm v. Logan*, 4 Bibb, 78; *Graham v. Samuels*, 1 Dana, 166; *Stephens v. Barnett*, 7 Dana, 258; *Bank of United States v. Huth*, 4 B. Mon., 450; *Alexander v. Smith*, 2 Duval, 518.)
6. The equity of creditors, under the act of 1856, is superior to that of the holder of an unrecorded mortgage. (*Hildeburn v. Brown*, 17 B. Mon., 782.)
7. If the recipient of the preference assists in procuring it or is guilty of fraud, he is prevented from prorating his claim. (*McCann v. Hill*, 85 Ky., 574; *Southworth v. Casey*, 78 Ky., 897; *O'Neil v. Miller*, 2 Bush, 291; *White v. Graves*, 7 J. J. Mar., 523.)
8. An agreement not to record a mortgage is an actual fraud. (*Lehman v. Van Winkle*, 8 South. Rep., 870; *Hildeburn v. Brown*, 17 B. Mon., 782.)
9. The proviso of the act of 1856, art. 2, sec. 1, chap. 44, Gen. Stats., brings mortgages given for simultaneously created debts within the operation of the statute as preferences, unless recorded within thirty days and is made in good faith. (*Terrell v. Jennings*, 1 Met., 452; *McCann v. Hill*, 85 Ky., 574; *Farmer v. Hawkins*, 79 Ky., 182.)
10. A mortgage may be good in part and a preference in part. (*Whitaker v. Garnet*, 3 Bush, 402.)
11. A mortgage operating as a preference can be attacked any time within six months after it is recorded. (Sec. 2, art. 2, chap. 44, Gen. Stats.; *Coger v. Stewart*, 78 Ky., 59.)
12. The object of pleading in actions brought under the act of 1856 is to compel the surrender of property for equal distribution among the creditors, and it is the last transfer that must be attacked to accomplish this purpose. (*Fuqua v. Ferrell*, 80 Ky., 69.)

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

Theodore Schwartz and Frederick Janssen were members of the late banking house of Theodore Schwartz & Co., at Louisville, Ky. Janssen held the legal title to a block between Twenty-sixth and Twenty-seventh streets and Broadway and Elliot avenue, known as the "West End" property, and Schwartz held the title to the "Christy Woods" property, consisting of some thirty-eight acres of land in the suburbs of the city. Both pieces were in fact the property of the firm.

In the cyclone of March, 1890, a tobacco factory of the firm was badly damaged, and in order to rebuild it Janssen sought his friend, the appellant Meier, a Cincin-

Meier v. Flinsbach, &c.

nati tobacconist of means, then temporarily in Louisville, and offered to sell him the "West End" property. After some discussion, the trade was consummated at the price of fifteen thousand dollars. Meier went home, and Janssen sent him a deed reciting a consideration of \$24,225 cash, giving as a reason that the firm owned other property in the neighborhood, and that the recitation of a lower consideration would depreciate that property. During the trade Meier proposed that if he should resell the property at a higher price he would pay Janssen the profit. And it was agreed that the deed was not to be recorded, the reason assigned being that if they found a purchaser soon, as was expected, this arrangement would dispense with the necessity for an extra deed. Meier sent the money by checks on the Merchants National Bank of Cincinnati, payable to Janssen, who indorsed them to the firm.

At the time of this transaction, and indeed for years before, Schwartz & Co. were hopelessly insolvent, but this was wholly unknown and wholly unsuspected. Until in the spring of 1891 none stood higher than the members of this firm in the social and business circles of Louisville and elsewhere. As conceded by counsel for the appellees, "they had the absolute confidence of the public, because of their supposed conservative methods." Their assets were showy, consisting of valuable real estate. Their liabilities were unknown, and supposed to be insignificant.

In December following this alleged sale, Schwartz wrote Meier at Cincinnati that they were again in need of money, and that he wanted to sell him the "Christy Woods" property. Meier was in Louisville shortly afterwards, and at first declined to buy any more real estate, but to accom-

modate Schwartz finally agreed to take that property at twenty-two thousand dollars provided he would take in the "West End" property at the price he had paid Janssen for it. This Schwartz agreed to do. The unrecorded deed to the "West End" property was then surrendered, and the sum of seven thousand dollars paid in cash. On December 19, 1890, a deed was made to Meier by Schwartz and wife, which was at once recorded in the proper office. The recited consideration was twenty-eight thousand dollars, as it was said that it would be easier to sell the property at its real worth if the price was so fixed. It was also agreed in writing that Schwartz was to effect a sale of the property within two years, and Meier was not to sell it in the meantime, unless at a profit, which was to be divided between the parties to the transaction. Meier was to deed back the property to Schwartz or to any one whom he might designate, within the two years, upon being repaid the \$22,000 and interest, less any rent received by him.

On March 19, 1891, Schwartz & Co. made a deed of assignment of their property for the benefit of all their creditors, and on the following day the appellees, Flinsbach and others, brought this suit to set aside a number of conveyances of real estate made by the firm and its members to sundry persons, upon the ground that they were made in contemplation of insolvency and with the design to prefer certain creditors to the exclusion of others. Among the conveyances so attacked was that of Schwartz and wife to the appellant, Meier, of December 19, 1890, and with this only we have to do on the appeal.

The chancellor, in an interesting opinion, held that the grantors were, on December 19th, and indeed long before,

hopelessly insolvent and knew it. That the pre-existing debt, satisfied by the conveyance of December 19th, was created in March, 1890. That both these conveyances were mortgages in fact, though conditional sales in form. That the mortgage in March, while good between the parties without being recorded, was not good under the act of 1856 against creditors, because not recorded within thirty days after its execution. That Meier occupied, therefore, the position of an unsecured creditor, "and hence a payment to him of a pre-existing debt, thus not secured, must be considered as the payment of an antecedent, unsecured debt, and hence within the statute."

In this conclusion we have not been able to agree with the learned chancellor. A careful reading of the statute, we think, will show that it can not be applied either to the mortgage of March or of December. It goes without argument that the purpose of the act was to inhibit a *debtor*—thus assuming the existence of a debt—from preferring one creditor over another.

The relation of debtor and creditor is assumed in the statute itself, and the relation must exist before the statute can be applied. The debt which the insolvent debtor can not give preference to, by a sale, mortgage, assignment, etc., is a *pre-existing* debt. The preference of the debtor to pay or secure a pre-existing creditor in contemplation of his impending insolvency is the act denounced by the statute. This can not occur when the creation of the debt and the execution of the instrument securing that debt are contemporaneous or simultaneous acts.

The act of Schwartz & Co., or of Janssen for them, in mortgaging the West End property in March and simultaneously getting the sum of \$15,000, is not an act either

preferring a pre-existing creditor or paying or securing a pre-existing debt. The act of Schwartz in mortgaging the Christy Woods property, it is true, secured a pre-existing debt to the extent of \$15,000, but the act of preferring or the intent to prefer is wholly lacking. The creditor got nothing he did not have before, and was therefore not preferred. Certainly not to the exclusion in whole or in part of other creditors.

The chancellor seems to have found his trouble in an attempt to apply the latter part of the statute under consideration to the case at hand, and it is in this attempt that he, as well as counsel for the appellees, fall, as we think, into error. After providing in the body of the section that every sale, mortgage, etc., made by a debtor in contemplation of insolvency and with the design to prefer one or more creditors to the exclusion of others, shall operate as an assignment, the section concludes with this proviso: "But nothing in this article shall vitiate or affect any mortgage made in good faith to secure any debt or liability created simultaneously with such mortgage, if the same be lodged for record within thirty days after its execution." (General Statutes, chapter 44, article 2, section 1). Now certainly it would seem self-evident that before trying to apply this proviso we should first find a case to which the body of the section can be applied.

In order to hang a thief you must first catch him, as "catching comes before hanging." In order to apply this proviso you must first find a case in which an insolvent debtor, or one in contemplation of insolvency, has made a mortgage or sale, etc., with the design to prefer one creditor to another.

If a given case have not the elements called for in the body of the act, we may rest assured that an attempt to apply the proviso will be a misfit. With the essential conditions of the statute in question ascertained to be inapplicable to the mortgages now under investigation, we could safely stop short of discussing the state of case which the statute, in its proviso, is said not to vitiate or affect. It is enough to know that the statute does not apply to the state of case under investigation. The act of Schwartz in making the December mortgage was not a preferential act in the meaning of the statute; nor was the act of Janssen such an act in making the mortgage of March, 1890. But if we may so divert, let us see what is meant by the latter part of this section. We think it is simple and easy of application.

First, we must know that the mortgage mentioned in the body of the section, that is, the one denounced as a preferential act, is not the mortgage mentioned in the proviso which is created simultaneously with the debt secured by it. The one is exactly what the other is not. The one is a preference, the other not. How then was it thought necessary to say the former shall not affect or vitiate the latter if recorded within thirty days? which is the same thing as saying that the former shall vitiate or affect the latter unless so recorded. Under the operation of the statute, by the execution of the prohibited mortgage or sale, a transfer of all the property and effects of the debtor is made to his creditors and for the benefit of all alike, provided, however, that notwithstanding such legal assignment, the transfer is not to overreach a mortgage made in good faith to secure a debt created simul-

taneously with such mortgage if the same be lodged for record within thirty days after its execution.

The preferential act, or, so to speak, the act of bankruptcy, operates necessarily not backward, but instantly and forward. After committing such an act a man may still sell his property, and if the purchaser buys it in good faith he is protected; and the bankrupt may still mortgage his property in good faith for a consideration simultaneously received, and this transaction is protected if the mortgagee puts his mortgage to record within the time prescribed, but if he pockets his mortgage, then the equity of the legal assignees, the creditors to whom the effects of the bankrupt have been transferred under the statute by virtue of the preferential act of the debtor, overreaches the equity of the negligent mortgagee. Not only is the after-given mortgage thus overreached unless recorded, but a mortgage which is given to secure even in part only a pre-existing debt sets the statute into operation; although it may also secure a debt simultaneously created therewith, it must be recorded within the time prescribed else the mortgagee is not protected or secured as to any part of his debt. If such a mortgage be recorded in time, the mortgagee's equity is prior to that of the general creditor to the extent of his simultaneously created debt.

In the case under consideration, we have a negligent mortgagee who failed to put his mortgage on the record after getting it in March, 1890. But where is the antecedent preferential act of the debtor which is to sweep his estate into hotch-potch for the benefit of his creditors? So far as is shown by the record the first act of the insolvent firm, or any of its members, coming within the

Fry, &c., v. Jones, &c.

condemnatory provisions of the statute, was on March 12, 1891. Then, for the first time, was the statute against preferences set in motion, and the rights of the appellant secured in good faith long before that date are not to be affected by it. He is entitled to have his debt paid in full, and the judgment is reversed, with instructions to enter an order to that effect.

CASE 25—PETITION ORDINARY—NOVEMBER 25.

Fry, &c., v. Jones, &c.

APPEAL FROM LINCOLN CIRCUIT COURT.

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IN THE CONTEST OF A WILL UPON THE GROUND OF UNDUE INFLUENCE, the question of the existence and exercise of such an influence upon the testator is peculiarly one for a jury; and while the jury may not determine its presence without evidence of it, yet where it has been found by the jury to exist this court will hesitate to set aside that finding upon the ground that it is not supported by the evidence.

The evidence recited in the opinion in this case was sufficient to authorize the jury to find that the will in contest was procured by the undue influence of one of several daughters of the testator, who was hostile to one of her sisters, who, as the result of that influence, was virtually excluded by the will, the estate being equally divided among the other children.

J. W. ALCORN AND J. B. PAXTON FOR APPELLANTS.

The court should have set aside the verdict as flagrantly against the evidence. (*Bush v. Lisle*, 89 Ky., 401; *Zimlich, &c., v. Zimlich, &c.*, 90 Ky., 657; *Hoerth v. Zable*, 92 Ky., 202.)

MILLER & OWSLEY FOR APPELLEES.

Cited: *Jarman on Wills*, ed. 1880, star pages 35, 36, 37 and notes; *Snyder's Ex'or v. Cunningham*, 18 Ky. Law Rep., 24; *Wills, &c., v. Tanner, &c.*, 13 Ky. Law Rep., 741; *Harrold, &c., v. Harrold, &c.*, 1 Duv., 203; *Shropshire, &c., v. Reno*, 5 J. J. Mar., 91; *McDaniel's Will Case*, 2 J. J. Mar., 331; *Hunt's Heirs v. Hunt*, 3 B. Mon., 665;

Fry, &c., v. Jones, &c.

Johnson v. Moore's Heirs, 1 Litt., 871; Carter, &c., v. Baird, &c., 11 Ky. Law Rep., 982; Smith, &c., v. Kelly, &c., 9 Bush, 558.

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

From the verdict of a properly instructed jury, finding the paper in contest not to be the last will and testament of Joseph Page, Sr., the propounders have appealed to this court complaining that such verdict is not sustained by the testimony, and is in fact flagrantly against it.

The testator died at the age of seventy-five years, the owner of a few hundred dollars' worth of personal property and a small farm in Lincoln county. He left as his only heirs, three daughters and one son. To one of his daughters, Mrs. Mary Jones, his first born, and for years his favorite child, he gave only the sum of \$150, and devised the balance of his estate to the other three children in equal portions, save that to one of the three, Mrs. Jennie Adams, he gave \$150 extra to compensate her for lack of educational advantages in her youth. Mrs. Jones contests the paper upon the ground of the testator's mental incapacity, and by reason of undue influence exercised over him.

It may be said of the testimony that it sufficiently establishes the mental ability of the testator to make the will, and unless the proof discloses a state of fact from which the jury could legitimately infer the existence and the exercise of an improper influence over him, the verdict must be set aside. It must be admitted that the rules by which may be ascertained the existence of a mental force or power so subtle and intangible as that denominated as "influence," or "undue influence," are not clearly defined or perhaps definable. Certainly

no general rule may be laid down by which this obnoxious force may be detected. We can easily say that the force must be such as to control the mental operations of the testator, and amount to a substitution of the will of the dominant over the weaker mind. But this is merely a statement of the effects of the inhibited influence. The question is how shall we detect its presence? Manifestly this may best be done by that tribunal to which is afforded the opportunity of meeting the witnesses face to face and hearing them testify in any given case. Before such the general bearing and conduct of all the witnesses, and especially the mental characteristics of those who are charged with having controlled another become matters of personal observation and oversight. To a jury of the vicinage, therefore, must be left in a large measure the detection of this refined and subtle, though reprehensible, power. They may not determine its presence without evidence of it, but we may well hesitate to determine the absence of such evidence when in their wisdom it is found to be present.

In the present case the testator had announced that "he would equalize his children in his estate." This was in the days of his physical and mental strength. In July, 1889, he was stricken with paralysis, a warning, however, which caused no change in his intentions. In August following he had a second and severer stroke. No one lived with him at that time, save his son-in-law Fry and wife, the daughter of the testator.

When the physician left the room on the occasion of this second stroke, starting home, this daughter, whom we shall presently see was hostile to her sister, Mrs. Jones, followed him out to the yard gate and asked

him to suggest the making of a will to her father. He returned, made the suggestion, and at the request of the testator, who said he had intended for some time to have one Cook to write his will, he came back next morning and wrote the instrument. This same daughter testified that her father, before this occasion, "had frequently talked to her about making a will, and always said he didn't intend for Mary to have any more than she had already gotten." The solicitude of this daughter that her father should be reminded of the alleged intention to cut off Mary, which he appears to have been about to forget, is worthy of notice, and especially as the proof is undisputed that Mary had only received from her father a cow and three sheep. The paralytic is left to rest under the delusion, however, that he had already provided for Mary. It appears that Mary, the contestant and appellee, had some years before the death of her father married her co-appellee, Jones, and did so with her father's approbation; but Jones became dissipated, and on several occasions, perhaps as many as three times, she left him and went to her father's. This troubled the old man greatly, and he advised her never to go back to live with her husband. He, at least, was willing enough to afford her a home, but her brother Joe was running the farm and refused to let her boy have a home on the old place. She therefore left, and again went back to her husband. She testifies that her father met her at Hustonville a month or so before his death and stopped her daughter and herself and talked to them kindly. That at no time did he ever speak an unkind word to her, and yet at his home, and when surrounded by the influences there, he is proven to have

Fry, &c., v. Jones, &c.

said that when he died he didn't want this daughter to come to his burial; that he was done with her forever! When she went to see her brother Joe, whom she had learned was about to die, her father came out and met her in her buggy. This was away from the house; but when she went to the house she was refused by this same sister the right to see her brother, then "dying and unconscious." There was no remonstrance from the old man at such conduct. His kindness of heart and love for the daughter who had as a barefooted child played in his blacksmith shop in the days of his poverty, shone forth when out from under the influences of those living with him and controlling him. In their presence he was dumb and unable to protect her from insult or provide a home for her children.

The cruel hostility of Fry and wife supplying the motive for the suggestion to the physician that the will be written—which was to cut off Mary—is shown in their conduct only a few nights before the testator's death. The appellee, just after this final stroke, had gone with a lady friend to see her father. She was not admitted to his presence upon the plea that it was against the orders of the physician, and was told by her brother-in-law, Fry, that her father had said if she or "any of her children should die he would not attend the burial, and he did not want her at his;" and the friend calling with her was admitted only on the condition that she did not tell the old man that his daughter had come to see him! When this friend expressed her regret to Mrs. Fry that she and her sister did not speak, she was told that "she was not sorry, that Mary was no sister of hers." This bitter and open hatred on the part

of those surrounding this enfeebled and diseased old man toward the appellee, whose sole offense consisted in cleaving to her husband, it may be inferred, was a potent influence ever present and operating to control the testator's action. In the *frequent talks* on the subject of his will had by Mrs. Fry with her father, the reiteration of such harsh and prejudicial language to him in his dependent and helpless condition, would readily create an unnatural aversion toward the absent daughter and destroy the equilibrium of his mind.

That this hostile influence was exercised we can hardly doubt. The disposition to exercise it is shown by the proof, the opportunity was afforded, and the effects are apparent.

We can not say—in the face of the finding of the jury to the contrary—that the proof does not disclose the existence and the exercise of undue influence on the mind of this dependent paralytic, causing him to change the fixed purpose he formerly had of equalizing his children.

The judgment must be affirmed.

 Biggerstaff's Ex'ors v. Biggerstaff's Adm'r.

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CASE 26—APPEAL TO CIRCUIT COURT—NOVEMBER 28.

Biggerstaff's Ex'ors v. Biggerstaff's Adm'r.

APPEAL FROM MONROE CIRCUIT COURT.

1. UNDER AN ANTE-NUPTIAL CONTRACT by which it was provided that "each party to this contract is to have, enjoy and use their own property which they own free from the interference of the other and to have the perfect right to sell, convey or otherwise dispose of the same as though no marriage had taken place," not only was each party excluded from any interest in the estate of the other during their joint lives, but upon the death of one the other was to have no interest in his or her estate.
2. APPEAL FROM ORDER PROBATING WILL.—Where the wife, by reason of such a contract, had no interest in her husband's estate upon his death, neither she, during her life, nor her administrator after her death, had any right to appeal from an order of the county court admitting his will to probate, and an appeal by her administrator should, upon motion of the propounders, have been dismissed.

W. L. PORTER AND A. W. SCOTT FOR APPELLANT.

1. As the ante-nuptial contract is not denied or attacked for fraud or want of consideration, it ought to be upheld. (*Forwood v. Forwood, &c.*, 86 Ky., 115.)
2. As the wife by that contract deprived herself of any interest in the husband's estate, she had no right to prosecute an appeal from the order probating the husband's will. (*Tinker v. Ringo's Ex'or*, 11 Ky. Law Rep., 120.)
3. Independent of the marriage contract the wife had no right to prosecute the appeal for the reason she can be in no way affected by the will, for as the husband by the will made no provision for her it is not necessary for her even to renounce the will to obtain whatever dower or distributable share she might be entitled to. (*Gen. Stats.*, chap. 31, sec. 12; *Cummings v. Daniel*, 9 Dana, 361.)

PORTER & McQUOWN OF COUNSEL ON SAME SIDE.

SANDIDGE & SANDIDGE AND JOHN G. CRADDOCK FOR APPELLEE.

1. The marriage of the testator operated as a revocation of his will. (*Gen. Stats.*, chap. 113, sec. 9; *Stewart v. Powell*, 90 Ky., 511.) *Stewart v. Mulholland*, 88 Ky., 38, distinguished.
2. The right of the widow to an interest in her deceased husband's estate can not be tried on this appeal.

Biggerstaff's Ex'ors v. Biggerstaff's Adm'r.

3. The marriage contract did not deprive ~~the wife~~ of her interest in the husband's estate after his death, but only deprived her of an ~~interest~~ in such of his property as he might dispose of before his death. Nor did it give validity to the will previously made by the husband. (Hart v. Sowhard, 14 B. M., 391; Gen. Stats., chap. 31, sec. 11.)

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

April 14, 1860, Hiram Biggerstaff made a will devising to his wife Susannah for life all his property, and to be equally divided at her death between his children, except five hundred dollars in money given to each of two grandchildren, America and Martha T. McComas. In 1867 being then a widower he married Melinda McComas, with whom he lived until his death in 1889. March 4, 1889, the paper dated April 14, 1860, was by order of the county court admitted to record as his last will. But upon appeal by Melinda Biggerstaff, widow, and America McComas and Martha Cloyd, formerly Martha McComas, his two grandchildren, judgment of the circuit court was rendered reversing that order and directing the county court to reject the paper as a will. However, before the case was submitted for final judgment of the circuit court, America McComas and Martha Cloyd caused an order made dismissing, as to each of them, the appeal from the county court order; thus leaving as only appellant, David McComas, administrator of Melinda Biggerstaff, who had in the meantime died.

According to a statutory provision the marriage of Hiram Biggerstaff, in 1867, operated as a revocation of his will made in 1860; and America McComas and Martha Cloyd, being his heirs at law, had a right to reversal of the erroneous order of the county court admitting the paper to record as his true last will. But if Melinda Biggerstaff had no interest in the estate of her deceased husband she

Biggerstaff's Ex'ors v. Biggerstaff's Adm'r.

was not at all affected by the county court order; nor could she while living, nor her administrator after her death, prosecute an appeal therefrom. And such being the case the motion to dismiss the appeal, made after America McComas and Martha Cloyd ceased to be parties, ought to have been sustained.

Whether she acquired or had in virtue of her marriage to Hiram Biggerstaff any interest in the estate at his death, depends upon proper construction and meaning of the following contract, which appears to have been duly executed and recorded:

"WHEREAS, Hiram Biggerstaff and Melinda McComas contemplate entering into the holy bonds of matrimony, and for the purpose of living forever in harmony we do hereby make the following marriage contract, to-wit: It is expressly understood and agreed that each party, that is to say, Hiram Biggerstaff is to hold what property he now has free from the claims of his contemplated wife, now Melinda McComas, and the said Melinda McComas is to have entire and complete control of all property that she now holds in her own right free from the claims of said Hiram, and is allowed the privilege of using her separate property in any way she may see fit and proper. It is expressly understood that each party to this contract is to have, enjoy and use their own property which they now own free from the interference of the other, and to have the perfect right to use, convey or otherwise dispose of the same as though no marriage had taken place.

"HIRAM BIGGERSTAFF,

"MELINDA MCCOMAS.

"November 27, 1867."

According to the language of that contract it is plain

the parties intended the property of each should be free of any marital right or claim of the other while they lived together as husband and wife, and also that neither should, at death of the other, be entitled to allotment or distribution of his or her estate as either curtesy or dower. For exclusion of claim or right on account of the marriage is not in terms or meaning of the contract limited to their lives, but was manifestly intended to continue and apply after death; indeed, the wife's claim to her husband's property is generally contingent upon his first dying.

Though the relative value of their property at time of the marriage does not appear, it is reasonable to assume, in absence of evidence to the contrary, she entered into the contract freely and intelligently, and that complete control of her own property, free of his claims, retained by her under the contract, was a fair consideration for her agreeing he should hold his property free from her claims, and "as though no marriage had taken place."

As we construe the contract, Melinda Biggerstaff had no interest whatever in the estate of her deceased husband, and it was consequently error to overrule the motion to dismiss the appeal from the county court order. Wherefore the judgment of the circuit court is reversed and cause remanded, with direction to sustain that motion.

City of Owensboro v. Weir, Weir & Walker.

CASE 27—AGREED CASE—NOVEMBER 28.

City of Owensboro v. Weir, Weir & Walker.

APPEAL FROM DAVEISS CIRCUIT COURT.

1. **POWER OF MAYOR OF CITY TO EMPLOY COUNSEL.**—The mayor of a city has no power either to authorize litigation on behalf of the city or to control it unless the emergency be serious and the necessity grave and impending.

Where the charter of a city gave the common council control of all property of the city, with power to prohibit persons from trespassing upon or injuring its public grounds, the mayor alone had no power to authorize the bringing of a suit in the name of the city to enjoin the county from inclosing grounds belonging to the city, or to employ counsel to assist in the prosecution of such a suit, and for services rendered by counsel under such an employment the city can not be required to pay.

2. **RATIFICATION BY CITY COUNCIL.**—Although the vote of the council upon a motion to allow the claim of the attorney shows that an appropriation was refused merely because there was a disagreement as to the amount, still it can not be regarded as a ratification of the mayor's employment. It shows at most but a willingness upon the part of a majority of the council to make some appropriation in compromise of the claim.
3. **NO SEPARATION BY THE COURT OF ITS CONCLUSIONS OF LAW AND FACT IS NECESSARY** to the prosecution of an appeal where a case is tried upon an agreed state of facts.

J. A. DEAN FOR APPELLANT.

The general rule is that the mayor can not bind the city by the employment of an attorney without the concurrence of the council. (*Memphis v. Adams*, 9 Heisk (Tenn.), 518; s. c., 24 Am. Rep., 381; *Bryan v. Page*, 51 Tex., 532; s. c., 32 Am. Rep., 637; *Carroll v. St. Louis*, 12 Mo., 444, cited and approved in 15 Am. and Eng. Ency. of Law, 1119; *Butler v. Charleston*, 7 Gray (Mass.), 14, cited and approved in 15 Am. and Eng. Ency. of Law, 1121.)

And it makes no difference that the attorneys were ignorant of the lack of authority on part of the mayor to bind the city. (1 *Dillon Mun. Corp.*, secs. 445, 447; *Craycraft v. Selva*, 10 Bush, 707.)

There is not in the case at bar any emergency that would bring it within the exception to the general rule as announced in the case of *City of Louisville v. Murphy*, 86 Ky., 65.

City of Owensboro v. Weir, Weir & Walker.

C. S. WALKER FOR APPELLEES.

1. The mayor had the power to employ counsel. (*City of Memphis v. Adams*, 9 Heisk, 518; s. c., 24 Am. Rep., 836, 837.)

In *City of Louisville v. Murphy*, 86 Ky., 65, this court did not intend to decide that the power of the mayor to employ counsel was dependent upon an emergency, but only that the exercise by him of such power should be seldom and in exceptional cases.

The mayor has absolute, full power to determine every question within the province of his office; and if his authority to do a certain act is conditional upon an emergency, he is, of necessity, the sole judge of the existence of such emergency, and his decision in regard to it is conclusive. (1 Dillon's Mun. Corp. (4th ed.), secs. 94, 95, 475, and 2d ed., 832.)

This view is in harmony with the decisions in analogous cases. (4 Am. and Eng. Ency. of Law, p. 883; *Washington County Court v. Thompson*, 13 Bush, 239; 1 Dillon's Mun. Corp., sec. 25; *Idem*, sec. 66, p. 108.)

2. If emergency be the test of the power of the mayor to employ counsel, and if the mayor be not the judge of what constitutes an emergency the emergency was decidedly greater in this case than in *City of Louisville v. Murphy*.
3. The city council knew that appellees looked to appellant for compensation for their services and it received them without giving any information that it would not pay for them, and it seems, even in this view of the case, that appellant is liable. (*Savings Bank v. Benton*, 2 Met., 244; 1 Dillon's Mun. Corp. (4th ed.), sec. 465, note.)

The power of the mayor to employ counsel is like that of the president of a bank. (1 Morse on Banks and Banking, sec. 143, b.)

4. There is a distinction between the employment of counsel to institute an action, and to assist in its prosecution after it has been regularly instituted in the name of the city by and through its properly constituted agents or officers. In the former case the doctrine that counsel must inquire into the authority of the officer to employ him applies, but in the latter case he has the right to assume that the action itself was duly authorized, and hence that his employment was legal.
5. The proceedings of the council upon the claim were a ratification of the employment. (*City of Memphis v. Adams*, 9 Heisk, 518; s. c., 24 Am. Rep., at page 838.)
6. A separation of the conclusions of law and fact is required in an agreed case in order to the prosecution of an appeal. (Civil Code, secs. 382, 637, 639.)

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

The question involved on this appeal is the liability of the appellant, City of Owensboro, for the fee of the

City of Owensboro v. Weir, Weir & Walker.

appellees—attorneys at law—for services rendered by them at the employment of the mayor of the appellant acting without the authority of the city council.

The circumstances of the employment are set forth in an “agreed case” and in the record in which the services were rendered.

The county judge of Daviess County, under an order of the county court to that effect, was proceeding to have inclosed under fence certain outlying grounds adjacent to the court-house square in the city of Owensboro. It may be presumed that this was being done with a view of obtaining permanent possession of the grounds about to be inclosed and of depriving the city of them, but it is not intimated that any act was about to be done which would injuriously affect the property, or that the county was about to commit any waste thereon, or carry off any portion thereof, or even to erect any buildings thereon. It had in fact only placed a number of stones thereon with the view of erecting a fence. It may be presumed that the mayor in good faith believed that the grounds about to be inclosed belonged to the city. Upon this state of case the mayor, acting alone, authorized the city attorney to institute proceedings against the county authorities enjoining them from interfering with the grounds mentioned. This the attorney sought to do by filing a petition as ordinary in the Daviess Circuit Court on the 11th day of April, 1889, but no injunction was granted him because of want of notice. The mayor then—still acting alone and without the authority of the city council—employed the appellees to assist in the prosecution of the case. Without inquiry as to the source of their employment beyond that obtained from the mayor, they filed an amended

petition, praying that the title of the plaintiff city in and to the grounds described be quieted, the stones be removed and the county be prevented from extending its fence around the disputed territory. This was done two days after the original petition had been filed. Before their motion for an injunction was heard, at an informal meeting held by the members of the council, the city attorney was instructed to dismiss the suit, which he did. While the statement appears in the "agreed case," and is set forward rather prominently in the argument of the appellees, that the appellees were not advised of the fact that the suit had been brought at the instance of the mayor without the authority of the council, or that the employment of the appellees was without such authority, we do not understand the appellees to contend that their cause of action can be maintained by reason of their ignorance of the authority under which, or by virtue of which, the mayor assumed to act in the premises stated. We assume it to be conceded that persons contracting with a corporation, or with its officers, must inquire into the power of the contracting body or person to make the impending contract. But it is contended that when the county officials commenced to remove the fence inclosing the court-house yard so as to take in ground in the possession of and belonging to the city, and when the city attorney had failed to present his case so as to obtain the relief sought, then an emergency arose which authorized the mayor to employ counsel; and that there was no time or necessity to convene the city council. But looking at the case from this standpoint—that of the exigency of the occasion—we are not so impressed with the gravity of the alleged emergency as counsel seem to be. The main

City of Owensboro v. Weir, Weir & Walker.

object sought to be determined by the litigation set on foot in the Daveiss Circuit Court was to quiet the title of the city to the ground in controversy. This was in no way affected by the proposed erection of the fence. By inclosing, the county did not become the owner of the property. As expressing our view on this point, we quote the apt language of the Superior Court (14 Ky. L. R., 711, Yost, judge) in determining this case then on appeal there; "A piece of ground which the mayor claimed was the property of the city was about to be inclosed. What right had he, the executive of the city government, to act alone in the matter? Why not call together the common council, and let that body act or refuse to act, at its pleasure? In it, and not in him, was vested the control of the property of the city, and the power to prevent any and all encroachments upon its streets or public squares. Yet with these powers so pointedly and specifically given the legislative branch of the city government, the executive, in the face of the prohibition of the charter, attempted to exercise an authority properly belonging to the other. . . . There was certainly no emergency in this case. The common council could have been at once called together. There was absolutely no reason for the mayor to act alone. While the amount charged was small and well earned, yet there is a principle involved important indeed to all municipalities, and we do not think, unless the emergency be serious and the necessity grave and impending, that the mayor should have the power either to authorize litigation in behalf of the city or to control it. A different rule of law would, in effect, dangerously enlarge and broaden the power of public officers to bind municipalities by contracts not only unauthorized, but

City of Owensboro v. Weir, Weir & Walker.

prohibited." This would seem to leave nothing further to be said under this head.

The common council, by the charter of the city, session Acts 1881, vol. 1, page 817, is given control of the finances and all property, real and personal, belonging to the city; power to prohibit persons from trespassing upon or injuring its public grounds; to appoint all agents necessary to carry into effect its laws and ordinances, and to prevent and remove any and all encroachments into or upon any street, alley, sidewalk, avenue or public square of the city, and to exercise complete and perfect control over all public squares or commons belonging to the city, and over all its property, real or personal, within or beyond its limits. The mayor is empowered to see that the laws of the city are faithfully executed, and shall, from time to time, give to the common council information of the state and condition of the corporation, and recommend to its consideration such measures as he may deem expedient, and for that or any other purpose may call special meetings of that body whenever it is, in his opinion, necessary to the interest of the city.

But while invoking the aid of the principle that pressing necessity justified the employment, and insisting that an emergency existed, calling into exercise the power of the mayor to act, counsel yet argue that emergency can not give the power, however great; though it may, and likely ought to, regulate its exercise. If the power exist, it is absolute, independent and inherent in the office itself. If it does not exist, no contingency, no emergency, no necessity, can create it. That if emergency be taken as the test of the power, not the courts, but the mayor, must be

City of Owensboro v. Weir, Weir & Walker.

the judge of what constitutes a sufficient emergency ! And the conclusion of the argument of the learned counsel is that the mayor has absolute, full power to determine, not (as we might suppose from the tendency of the argument) the circumstances or emergencies under which he might properly act, but to determine every question *within the province of his office* ! And to all this we agree. Within the province of his office the acts of the mayor must be confined. Emergency can not create a power; but when a state of case arises in which the performance of the duties of his office is involved, he may lawfully act. This state of case, or emergency, if we call it such, calls into exercise this action. But his action must be within the scope of his powers as laid down in the law creating him. The power of the mayor is defined in the law creating the office, not in express terms, because there are implied powers; but in all cases the power must be worked out through and under the law creating the office.

The case of *City of Louisville v. Murphy*, 86 Ky., 53, is relied on as conclusively sustaining the contention of the appellees. In that case it is said : "While as a general rule the mayor of a city has no authority by virtue of his office to employ counsel, the power being conferred by the charter or by the legislature of the city, cases of emergency may arise, when the power must necessarily exist. It is made the duty of the mayor to see that the law and ordinances of the city are faithfully executed, and that the official duties of the city officials are faithfully performed. In this case the council had failed to impose any tax. The city was left without means, as the mayor had the right to suppose, of carrying on the city government. The officials were proceeding to collect a

City of Owensboro v. Weir, Weir & Walker.

tax without any ordinance of the city council. In such an emergency he called on counsel for advice. We think such a power existed. We think the mayor has no general power to authorize litigation in behalf of the city or to control it. If so, he could disregard the legislative will of the municipality, bringing and dismissing suits at his pleasure. It is certainly an exceptional case where it should be allowed, and one that seldom arises; but the emergency in this case justified the act, as all the parties acted no doubt in the best of faith." In that case, a state of case arose—called an emergency in the opinion—in which the performance of the official duties of the officers of the city and the power of carrying on the city government were involved. We can not see that it supports the contention of the appellees, and think that it is in accord with the views here expressed. It was an extreme case—and this action to quiet title and to prevent an encroachment on the realty of the city does not approach it in its demand for immediate action.

It is insisted that a ratification of the action of the mayor is shown by the vote of the council on the motion to allow the claim of the appellees. The claim being before the council for action thereon, the proceedings are thus stated: "Whereupon, Mr. Decker moved that Mr. Walker be allowed \$50 as a fee in the litigation, which was lost by the following vote, viz., ayes, Messrs. Decker, Norton, Hill; noes, Messrs. Smith, Granz, Stirman, and Mayor Hickman. Messrs. Stirman and Granz then moved that Mr. Walker be allowed the full amount of his claim, \$150, which was rejected by the following vote, viz., ayes, Messrs. Stirman, Granz; noes, Messrs. Decker, Norton, Hill and Smith."

City of Owensboro v. Weir, Weir & Walker.

We are asked to suppose—and it may be so figured out pretty clearly—that those who voted “no” as to the \$50, except Smith, did so because they did not consider that sum enough, and that those who voted “no” as to the \$150, except Smith, did so because they considered it too much, and that therefore no appropriation was made because they disagreed as to the amount only. But how this is to be construed into a recognition of the mayor’s employment, we can not see. After all, the vote shows no ratification, though it might show that a majority of the members were willing to make some appropriation in compromise of the claim of the attorney.

But, say the appellees with earnestness, there was no statement by the court of its conclusions of fact found, separately from its conclusions of law.

Section 332 of the Civil Code provides that “upon trials of questions of fact by the court, it shall not be necessary for the court to state its findings, except generally, for the plaintiff or defendant, unless one of the parties request it, with a view of excepting to the decision of the court upon the questions of law involved in the trial; in which case, the court shall state in writing the conclusions of fact found, separately from the conclusions of law.”

Now upon an agreed state of fact, what could the court do in the way of stating “in writing the conclusions of fact found separately from the conclusions of law?” Simply copy or re-state the agreed state of fact! Clearly the court’s judgment on the law only was asked. There was no *trial* of questions of fact. The case of *Harris v. Ray*, 15 B. M., 629, cited by counsel, simply determined that the provisions of the Code regulating applications for

 Boyd County, &c., v. Ross.

a new trial applied to judgments by default. It has no bearing on the section quoted.

Judgment reversed, with directions to proceed in accordance with this opinion.

CASE 28—APPEAL TO CIRCUIT COURT—DECEMBER 2.

Boyd County, &c., v. Ross.

APPEAL FROM BOYD CIRCUIT COURT.

1. IT IS ESSENTIAL TO THE VALIDITY OF A COUNTY LEVY BOND executed by a sheriff that there should be an order of the county court approving and accepting the bond. And where the court fails to enter such an order during the term at which the bond is accepted, it has no power, at a subsequent term, to enter the order *nunc pro tunc*.
2. NUNC PRO TUNC ORDER.—The mere recollection of the judge of a court of what took place at a former term is not sufficient to authorize an addition to, or an amendment of, the record in regard to any order or judgment. There must be something in the record by which to amend.
3. SAME—RIGHT OF APPEAL.—Where the county court made an order noting the acceptance of a county levy bond, executed at a former term, an action having been brought on the bond, the sureties had such an interest as gave them the right to except to the making of the order and to appeal therefrom to the circuit court.

JOHN F. HAGER AND WM. J. HENDRICK FOR APPELLANT.

The general power of any court to make *nunc pro tunc* orders such as was made in this case, the evidence being satisfactory, is not denied. The difficulty lies in the character of the evidence that is admissible to prove the oversight or misprision that is sought to be corrected. Some authorities hold that in the case of judgments and decrees, if not in the case of formal orders, no other evidence is admissible save that of a written character, such as the notes or memoranda of the clerk or judge, or some writing in the record. This is the ancient doctrine. The modern authorities uniformly hold that *any* satisfactory or convincing proof, especially when untraversed, is sufficient, even though a term may have elapsed. (Black on Judgments, secs. 130, 135; Freeman on Judgments, secs. 61, 63; Boyle v. Connelly, 2 Bibb,

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Boyd County, &c., v. Ross.

7; Conn v. Doyle, *Idem*, 248; Raymond v. Smith, 1 Met., 67; 2 Met., 427; Gray v. Brignardello, 1 Wall, 627; 119 U. S., 587; 25 Conn., 837; 53 Md., 179; 8 Cush., 315; 43 N. H., 508; 14 John., 219; 7 Cow., 244; 3 Dev. L., 423; 1 Dev. L., 313; 2 Jones L., 381; 8 O. St., 201; 24 Wis., 477; Nimbe v. Clark, 4 Am. St. Rep., 828-84, note; 23 Ala., 684; 61 Ala., 329; Graham v. Lynn, 4 B. M., 17; Frink v. Frink (N. H.), 80 Am. Dec., 191; Fay v. Wenzell, 8 Cush., 317; Balch v. Shaw, 7 Cush, 284; Lemerick v. Peter, 18 Me., 186; Weed v. Weed, 25 Conn., 837; Hallister v. Judges, 8 Ohio St., 201; Ins. Co. v. Boone, 95 U. S., 125; Supervisors v. Durant, 9 Wall., 736; Norton v. Sanders, 3 J. J. Mar., 397, and 7 J. J. Mar. 12; Wade v. Bryant, 9 Ky. Law Rep., 875; Wight, petitioner, 134 U. S., 136; Bishop on Crim. Proc., sec. 1160; Galloway v. McKeithen, 5 Ind., 12; Hyde v. Curling, 10 Mo., 374; State v. Clark, 18 Mo., 432; Nelson v. Baker, 3 McLean, 379; Bilansky v. Minn., 3 Minn., 427.)

In this case the judgment below is erroneous in any view that can be taken of the case. If it was competent for the county court to make the *nunc pro tunc* order on parol proof, it had such proof; if it was competent for the county court to make the order on a written memorandum, it had that also.

2. If the court should decide that written proof is necessary in the case of amending or supplying a judgment, it does not necessarily follow that it would also be necessary in the case of an order which has none of the elements of a judgment, but which is commanded to be made by a court acting in a ministerial capacity for the satisfaction and security of the sovereign power. The penalty for failing to enter the matter of record is that the sheriff can not act at all, not that his sureties or himself shall be released from all obligation. (Murfree on Official Bonds, sec. 46; Brandt on Suretyship and Guaranty, sec. 556 *et seq.*)

KNOTT & EDELEN FOR APPELLEES.

1. There must be a signing, delivery and acceptance of the sheriff's county levy bond to render it obligatory; and the records of the county court must show in some form the delivery and acceptance. (Gen. Stats., title, County Levy; Commonwealth v. Williams, 14 Bush, 297.)
2. A *nunc pro tunc* order may not be made after the term at which it ought to have been made unless there is a record or some memorandum which the law requires the judge or clerk to make from which the omitted order may be entered. And an amendment of the record by the judge's recollection is of no more binding force than an amendment on parol proof. (Conn v. Doyle, 2 Bibb, 248; Boyle v. Connelly, *Idem*, 7; Norton v. Sanders, 7 J. J. M., 12; Snodgrass v. Adams, *Idem*, 165; 3 Salk., 29; Varnon v. Moore, 1 Mon., 213; Graham v. Lynn, 4 B. M., 17; Raymond v. Smith, 1 Met., 65;

Boyd County, &c., v. Ross.

Vandever v. Griffith, 2 Met., 425; Lynch v. Reynolds, 6 Bush, 547; Martin v. Martin's Adm'r, 6 Ky. Law Rep., 451; Commonwealth v. Yarbrough, 84 Ky., 496; Wade v. Bryant, 9 Ky. Law Rep., 875; Johnson v. Commonwealth, 80 Ky., 377; Stephens v. Wilson, 14 B. M., 71; Finnell v. Jones' Ex'or, 7 Bush, 359; Black on Judgments, sec. 135; Freeman on Judgments, sec. 61; Herring v. Cherry, 75 Ala., 376; Atkinson v. Atchison, &c., R. Co., 81 Mo., 50; Hegeler v. Heuckel, 27 Cal., 491; Adams v. BeQua, 22 Fla., 250; Pitman v. Lowe, 24 Ga., 429; Makepeace v. Lukens, 27 Ind., 435; Moody v. Grant, 41 Miss., 565; Waldo v. Spencer, 4 Conn., 71; Ludlow v. Johnson, 8 Ohio, 553; Cairo, &c., R. Co. v. Holbrook, 72 Ill., 419.)

EVERETT & LACKEY ON SAME SIDE.

1. Before the bond of Kibbee could become binding upon the sureties, or entitle Kibbee to collect the taxes, it was necessary that the bond should be accepted by the county court, and that the acceptance should be shown by the record. (Commonwealth v. Williams, 14 Bush, 297; Wells v. Caldwell, 1 Mar., 441.)
2. A *nunc pro tunc* order can be entered only when such an order was *in fact* made, but by oversight or mistake has not been entered; and record evidence is required of the *fact* that the order was originally made and of its contents. (Raymond v. Smith, 1 Met., 65; Graham v. Lynn, 4 B. M., 17; Gray v. Brignardello, 1 Wall., 627; Gibson v. Chouteau, 100 Am. Dec.; Dennis v. Heath, 49 Am. Dec., 51; Allen v. Bradford, 87 Am. Dec., 690; Hudson v. Hudson, 56 Am. Dec., 200; Draughan v. Tombeckbee Bank, 18 Am. Dec., 609; Ludlow v. Johnson, 17 Am. Dec., 630; Gardner's Adm'r v. McKinney, MS. Op., Superior Court, September 15, 1882.)
3. The appellees had the right of appeal from the *nunc pro tunc* order. (Commonwealth v. L. & N. R. Co., 12 Ky. Law Rep., 51.)

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the circuit court reversing and setting aside an order made September 23, 1889, by the Boyd County Court, directing entered of record, *nunc pro tunc*, the following, alleged to have been made and directed entered of record January 23, 1888, as an order of said county court, viz.: "L. L. Kibbee, sheriff of Boyd county, this day appeared in open court and, together with G. W. Ross and others named, who are approved and accepted by the court, entered into,

Boyd County, &c., v. Ross.

signed, acknowledged and delivered bond to the Commonwealth of Kentucky, conditioned according to law, for the collection of the county levy of Boyd county for the year 1888, which bond is accepted and approved by the court." It seems to be conceded no order of court approving and accepting the bond of Kibbee, sheriff, and sureties was entered of record during term of the Boyd County Court, including January 23, 1888; in fact, it appears no such entry was made, from the following recital in the order of September 23, 1889: "The response of G. W. Ross and others, sureties of L. L. Kibbee, to rule awarded herein at April term, 1889, of this court, having been considered, together with the records of this court, including the county levy bond of said Kibbee, 23d of January, 1888, the court finds and adjudges, *from the recollection and memory of the judge (then and now the court has, of the facts connected with the execution, acknowledgment, delivery and acceptance of said bond)*, that an order of this court was, on said 23d January, 1888, made and directed to be entered, accepting and approving the bond," etc.

It is no less the right and duty of a county court, under the statute, to pass upon and determine as to sufficiency of sureties in a county levy than in a revenue bond. And it is essential to the validity and force of each that it be not only signed and delivered by sureties, but also accepted and approved by the court. (Commonwealth v. Williams, 14 Bush, 297; Bracken County Commissioners v. Daum, 80 Ky., 388; Commonwealth v. Yarbrough, 84 Ky., 496.) It thus becomes apparent that execution of the bond, though filed and kept by the clerk, affords no evidence of the other essential and independent

fact that the sureties were approved and the bond was accepted by the court. So that as there was not at the time entered of record an order of court approving and accepting the bond, appellees (sureties) can be made liable for default of the sheriff only, if at all, in virtue of the order of September 23, 1889. And as it appears an action had been brought on the bond against them for that cause, they had a direct interest to resist making such order and clear right of appeal therefrom to the circuit court. The only question, then, for us to consider is whether the county court had authority to make and have recorded the order of September 23, 1889.

In *Conn v. Doyle*, 2 Bibb, 248, this court used the following language: "During the term the court has power to alter or amend the record according to truth of the case, but after the term expires the court ceases to have such power, except in cases of clerical misprision; and even then it is an inviolable rule that no amendment can be made *unless there is something in the record* to amend by. This rule is necessary to preserve that sanctity and verity which in contemplation of law the record possesses. For if the record could be altered or amended by anything but itself, it would in point of verity be inferior to that by which it is amended."

The general rule thus stated has been repeatedly and uniformly approved and applied by this court. And it has been distinctly held more than once that the mere recollection of the judge of a court of what took place at a former term is not sufficient to authorize an addition to or amendment of the record in regard to any order or judgment. In *Lynch v. Reynolds*, 6 Bush, 547, is this expression and emphatic language: "The proposition is

Boyd County, &c., v. Ross.

to supply the whole by memory of the judge alone of what took place. The accuracy of memory of the judge as to what he states can not be questioned ; but can omissions and failures to enter orders and judgments be thus supplied at a subsequent term? If they can, the records of courts must lose their verity and the rights of citizens depend on varying and fading memories of men. The law forbids such a state of things. This question we regard as settled in *Vandever v. Griffith*, 2 Met., 425."

It seems to us there could be no better illustration than is afforded by this case of the wisdom of adhering to that rule. The statute in force when the alleged bond was executed required each county judge to ascertain and determine the solvency and sufficiency of county levy bonds; and, in case of approval and acceptances, to make and cause an order showing the fact to be entered of record. It was, besides, his duty to examine the order-book and see the order was duly entered. But, as result of negligence of the county judge of Boyd in failing to have the order accepting the bond entered of record, if it ever was indeed accepted, there was no way to obtain remedy for default of Sheriff Kibbee against his sureties, without such an order as was attempted to be made September 23, 1889. So that the county judge had a personal interest in making that order whereby to render sureties of Kibbee, not so before, then liable, and release himself from possible liability.

In our opinion the rule should be strictly applied in this case, and the judgment of the circuit court is therefore affirmed.

Sears' Heirs v. Sears' Heirs.

CASE 29—PETITION EQUITY—DECEMBER 2.

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Sears' Heirs v. Sears' Heirs.

APPEAL FROM WHITLEY COURT OF COMMON PLEAS.

1. **CONCLUSIVENESS OF JUDGMENT.**—Where the record in which a judgment was rendered shows the service of a summons, whether actual or constructive, it imports absolute verity, and the judgment is conclusive until vacated or reversed in some direct proceeding.
2. **DEFECT IN AFFIDAVIT FOR WARNING ORDER.**—A judgment rendered pursuant to a warning order made by the clerk in due form will not be declared void in a collateral proceeding merely because the jurat of the affidavit for the warning order was not signed by an officer.

O. H. WADDLE FOR APPELLANT.

1. In cases of constructive service of process, if there is an entire absence of evidence as to the necessary preliminary steps having been taken, the court will presume that its officers did their duty. But when the record shows that certain steps were taken to obtain jurisdiction, and the law does not consider those steps sufficient, the judgment will be regarded as void for want of jurisdiction. (Freeman on Judgments, secs. 125, 130, 132; Clark v. Thompson, 47 Ill., 25; Hahn v. Kelly, 34 Cal., 391; Newcomb v. Newcomb, 34 Cal., 391; Zechain v. Bowen, 40 Am. Dec., 111; Long v. Montgomery, 6 Bush, 394; Green's Heirs v. Breckinridge's Heirs, 4 Mon., 541.)
2. The paper upon which the warning order was issued does not satisfy the requirements of the Code as to an affidavit. (Civil Code, secs. 544, 551.)

HILL & DENHAM FOR APPELLEES.

1. The presumption exists that the clerk in making the warning order did his duty, and that all requirements of the statute were fully complied with. (Newcomb's Ex'ors v. Newcomb, 13 Bush, 544.)
2. The objections urged here might have been ground for reversing the judgment in the Rains case, but they do not render the judgment void, it having been rendered by a court of general and competent jurisdiction, and it can not be attacked in a collateral way. (Hynes v. Oldham, 3 Mon., 266; Benningfield v. Reed, 8 B. M., 102; Carr's Adm'r v. Carr, 13 Ky. Law Rep., 756; Harrison v. Hood, 12 B. M., 471; Gossom v. Donaldson, 18 B. M., 237; Thornton, &c., v. McGrath, 1 Duv., 354; Dorsey, &c., v. Kendall, 8 Bush, 294.)
3. Judicial sales will not be declared void on account of slight defects in preparation. (Thornton, &c., v. McGrath, 1 Duv., 354; 2 Black on Judgments, sec. 281; Wade on Law of Notice, sec. 1085; Freeman on Judgments, sec. 127.)

Sears' Heirs v. Sears' Heirs.

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

At the suit of a creditor in December, 1877, the lands of one Geo. Y. Sears, deceased, were sold under a judgment of the Whitley court. Some of his children were proceeded against as non-residents, and because the jurat of the affidavit for the warning order is not signed by an officer, it is claimed by the appellants—representatives of these non-residents—who are now suing for the lands, that as to them the sale is void. The affidavit, or what purports to be one, follows the petition, is signed by the supposed affiant, and the clerk in due form made the order of warning.

The law plainly directs that the clerk shall not make such order "except upon an affidavit of the plaintiff or of his agent or attorney," etc. Shall we say that the officer flagrantly violated this plain provision of the law and illegally made the order? or that he merely carelessly omitted to sign his name to the formal certificate of what he had properly done? If the question were one open for presumption, we should readily conclude that the clerk in fact administered the requisite oath, and if so, the law is satisfied. It may be observed further, as within the legitimate domain of presumption, that because we find attached to the petition an imperfect affidavit we are not thereby precluded from presuming the existence of another and perfect one on which the clerk acted in making the order. But aside from all this, in collateral proceedings attacking the validity of a judgment, the rule is well established that where the record in which the judgment was rendered shows the service of a summons, whether actual or constructive—and the order of warning is the constructive summons—it imports absolute

Payne, &c., v. Johnson's Ex'ors.

verity, and the judgment is conclusive until vacated or reversed in some direct proceeding. (Newcomb's Ex'or, &c., v. Newcomb, 13 Bush, 562; Dorsey, &c., v. Kendall, &c., 8 Bush, 294.)

A similar question was determined by this court in Wilson, &c., v. Tague, &c., 95 Ky., 47, where the failure of the clerk to write the affidavit for the warning order in the usual form was held to render the judgment erroneous merely, and not void.

The appellants also assert title by virtue of certain alleged written contracts with some of the children of Sears, under which, however, even if the writings are sufficiently descriptive, they took no possession or did any other act to put others upon notice of their alleged equity.

The judgment dismissing the petition is affirmed.

CASE 30—PETITION EQUITY—DECEMBER 7.

Payne, &c., v. Johnson's Ex'ors.

APPEAL FROM FAYETTE CIRCUIT COURT.

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1. TO AUTHORIZE A DEED TO BE TREATED AS THE EXECUTION OF A POWER OF APPOINTMENT by the grantor, the intention to execute the power must be clear, so that the transaction shall not be fairly susceptible of any other interpretation. Therefore, where a devisee under a will took one-half his share in fee and the other half for life, and after his death "to such uses as he may declare, limit or appoint by deed or will," a deed executed by him conveying "all his right, title, interest and claim" in and to the property devised, can not be regarded as an execution of the power of appointment, and therefore passed the absolute estate in one-half the property described and only the grantor's life estate in the other half.
2. EXECUTION OF POWER OF APPOINTMENT BY WILL.—While such is the general rule as to the execution of powers of appointment and is

Payne, &c., v. Johnson's Ex'ors.

still the rule in this State as to the execution of such powers by deed, the rule as to the execution of such powers by will has been changed by our statute, under which a general devise of what the testator owns must be regarded as the execution of a discretionary power of appointment unless a different intention appears by the will. (Gen. Stats., chap. 113, sec. 22.) Therefore a devise by a testator of "what little property I have after the payment of my debts" passes property which had been devised to him for life and after his death to such uses as he might appoint by will.

3. **DEVISE CHARGING PROPERTY WITH PAYMENT OF DEBTS.**—The testator by such a devise charged with the payment of his debts the property held by him for life with power of appointment, as he had a right to do.
4. **LIFE ESTATE WITH POWER OF DISPOSITION.**—While a devise of an estate generally or indefinitely, with the power of disposition, passes the fee, yet where the first taker is given an estate for life only, that express limitation will control the operation of the power and prevent it from enlarging the estate into a fee.
5. **SUBSTITUTION.**—Where money borrowed by a devisee was applied to the extinguishment of liens on the land devised which had been created by the testator, that fact did not entitle the creditor to be substituted to the rights of the lienholder. Having taken indemnity from the devisee by way of mortgage he obtained in that way all he bargained for.
6. **PARTIES TO ACTION—JUDICIAL SALES—REVERSAL OF JUDGMENT.**—While all creditors are not necessary parties to an action by an administrator for the settlement of his intestate's estate, still they are entitled to be heard. And in a case like this, where creditors of a testator are claiming contract liens upon property which the testator has by his will charged with the payment of debts generally, the general creditors, or some of them, are necessary parties to the action. And the court in this case having improperly adjudged the existence of a lien, the general creditors not being parties to the action and having no one to represent them, the general rule that the reversal of a judgment does affect the title of the purchaser at a sale made under the judgment, does not apply, and the sale as well as the judgment should be set aside.

DAVID W. FAIRLEIGH FOR APPELLANT.

1. The complex conveyances creating the liens to secure the payment of the notes sued on are to be regarded as mere mortgages.
2. An instrument will not be treated as the execution of a power unless the intention to execute is apparent and clear, so that the transaction is not fairly susceptible of any other interpretation. (*Blagge v. Miles*, 1 Story, 426.)

Payne, &c., v. Johnson's Ex'ors.

3. A power is not an estate and has none of the elements of an estate. (18 Am. and Eng. Ency. of Law, 881; Jones v. Clifton, 101 U. S., 225.)
4. The power was not executed or intended to be executed by Aaron K. Woolley by any instrument made by him anterior to his will. But even if there was an attempt or intention to execute the power, the attempt was abortive, because the power could not be executed by mortgage.

The doctrine that the power of sale includes the power to mortgage, which was never the law of Kentucky, has no application to the question in hand. Here Aaron K. Woolley had only a bare authority to nominate a person, in a named event, to take the remainder in fee, and the person so nominated would not take as his grantee, nor under his instrument of appointment, but under the instrument creating the power, viz.: the will of Mrs. Woolley. The appointee would take the remainder in fee as *devisee* under Mrs. Woolley's will. (Cruise's Digest, 219; 4 Kent's Comm., 827, 837; 2 Washb. on Real Prop., 820; Legget v. Doremus, 25 N. J. Eq., 122; Albert v. Albert, 68 Md., 352; 18 Am. and Eng. Ency. of Law, 925.)

The mortgagee has no title or estate in the land, but only a lien for the security of the debt. (Woolley v. Holt, 14 Bush, 788.)

5. The power was not executed by the paper probated as the will of Aaron K. Woolley.
6. The court should reverse the order confirming the sale as well as the judgment under which the sale was made. The doctrine of the security of purchasers at judicial sales does not apply where there is an appropriation of one person's property to pay the debts of another. (Miller v. Hall and Wife, 1 Bush, 229.)

R. W. WOOLLEY AND FAIRLEIGH & STRAUS OF COUNSEL ON SAME SIDE.

J. D. HUNT FOR JOHNSON'S EXECUTORS.

1. The mortgages to Zerilda Hearn and M. C. Johnson were operative not only as a mortgage of Aaron K. Woolley's fee-simple moiety, but also as an appointment by deed of the moiety of which he had only a life estate, with the power of appointment, and on Aaron K. Woolley's death without issue became effectual as a valid mortgage of the entire estate. But if for any reason that contention be not well founded, then the absolute deed of Aaron K. Woolley to John B. Payne and the deed of trust from John B. Payne to R. W. and F. W. Woolley, trustees (in the execution of which Aaron K. Woolley also united), by which the plaintiff's debts were expressly secured, constituted another full and valid appointment within the powers conferred by Mrs. S. H. Woolley's will.
2. An error in the judgment directing the sale furnishes no ground for setting aside the sale. (Hayes v. Griffith, 85 Ky., 377; Yocum v. Foreman, 14 Bush, 494.)

Payne, &c., v. Johnson's Ex'ors.

GEO. S. SHANKLIN FOR APPELLEE JOHN T. HUGHES.

Where the court has jurisdiction of the subject matter and of the parties, and there is no unfairness in the transaction, the title acquired by a purchaser at judicial sale will never, upon a reversal of the judgment or decree, be disturbed. (*Parker's Heirs v. Anderson's Heirs*, 5 Mon., 445; *Amos v. Stockton*, 5 J. J. Mar., 638; *Clark v. Farrow*, 10 B. M. 446; *Benningfield v. Reed*, 8 B. M., 102; *Gosson v. Donaldson*, 18 B. M., 230; *Yocum v. Foreman*, 14 Bush, 694; *South Fork Canal Co. v. Gordon*, 2 Abbott, 485.)

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

Mrs. Sally Howard Woolley died in the county of Fayette, leaving a large real and personal estate which she devised to her children. The present litigation originated from the sixth clause of her will, which reads as follows:

"Sixth. It is my will that my executors and trustees, after the payment of my debts and settlement of my estate, divide or cause to be divided all the rest and residue of my estate, real, personal or mixed, into equal portions, for the purpose of making just and equal partition among my children, and their descendants; and after such division shall have been made, I direct my executors and trustees to convey to each one of my children, or their descendants entitled thereto, one-half of such share or purpart, absolutely and in fee-simple, and the other half of such share shall be held or invested in good real estate in the discretion of my trustees and executors for the use and benefit of my said child for the term of his natural life, and after his death to the use and for the benefit of his children, or in default of children living at the time of his death, to such uses as such child may declare, limit, or appoint by deed or will; and in default of such appointment, then such moiety of such share shall pass to and vest in the heirs of such child absolutely and in fee-simple. . . . It is my will that this provision shall only apply to the shares of my

sons, and not to the shares of my daughters, which are hereinafter specially provided for by me."

Under this clause of the will each son had an interest in fee-simple in one-half of the share allotted him, and a life estate in the other half, with remainder to his children, and in default of children living at the son's death, the latter (the son) is given the power of appointment by deed or will to such uses as he may see proper; and in default of such appointment then the moiety devised to the son for life shall pass to his heirs in fee-simple.

The testatrix was the owner at her death of a large and valuable tract of land near Lexington, called "Howard's Grove." The executors of the will had the real estate partitioned between the devisees, and Aaron K. Woolley, one of her sons, obtained as his share in the Howard's Grove tract one hundred and sixty-six acres, that was conveyed to him by the executors as directed by the will, one-half in fee-simple and one moiety for life, with remainder over with the power of appointment, etc. Before any partition of this land was made, Aaron K. Woolley (the son) made an absolute conveyance to John B. Payne of "*all his right, title, interest and claim*" in and to this Howard's Grove tract of land, and also his interest in other realty located in and out of the State. While this conveyance to John B. Payne is absolute on its face, it is apparent that it was not a sale, but executed to Payne to enable the grantor to raise money to pay off his indebtedness, and by a writing, executed by John B. Payne at the date of the deed, made to him by Woolley, Payne obligated himself, after he was repaid any moneys he might advance for Woolley, to convey this land in trust to Robert and Frank Woolley, to hold for the benefit of the

Payne, &c., v. Johnson's Ex'ors.

original grantor, in the same manner as provided by the will of his mother, reserving to the grantor (Aaron K. Woolley) the power of appointment by deed or will. It does not appear that Payne paid any money for Woolley, and the former after this, by a conveyance of record, substituted R. W. Woolley and Frank Woolley as trustees for Aaron K., as provided by the terms of the obligation executed by Payne to Aaron K. Woolley at the time Woolley executed the conveyance to Payne.

Prior to the conveyance by Payne to these trustees, Payne and A. K. Woolley executed a mortgage to Zerilda R. Hearn on sixty-six acres of this share of the Howard's Grove tract allotted to A. K. Woolley in the partition, to secure the payment of three thousand dollars, and in the year 1876 the trustees, R. W. Woolley and Frank Woolley, in conjunction with Aaron K., placed another mortgage on the latter's share, one hundred and sixty-six acres, to secure a debt to Madison C. Johnson of one thousand seven hundred dollars, the mortgage purporting to convey all of the first parties' "*right, title and interest of any kind in the above described property.*"

The conveyance from A. K. Woolley to Payne was executed to the latter on the 2d of September, 1873, and reconveyed to R. W. Woolley and Frank Woolley, as trustees of A. K. Woolley, on the 23d of March, 1874, and in each conveyance the limitations and conditions placed upon the share devised to A. K. Woolley are reserved to the devisee, and particularly by the writing executed by John B. Payne to A. K. Woolley at the date of the conveyance by Woolley to Payne. That writing, of the same date of the deed, authorizes Payne to reconvey to Robert W. Woolley and to Frank Woolley this land

in trust, which was done by the deed of March 23, 1874. The writing further provides that these trustees shall convey the property in such manner as he may by will direct, showing a reservation on the part of A. K. Woolley of the right to exercise this power given him by the will of his mother.

After the execution of these several conveyances, including the mortgages to Mrs. Hearn and to M. C. Johnson, A. K. Woolley died, leaving a last will, by which he devised his estate to his sister, Mrs. Payne, Frank Woolley and Vertner Woolley. The will was admitted to probate in the Fayette County Court, its contents being embraced in a letter written to his sister, Mrs. Payne: "What little property I have, after the payment of my debts, I desire shall be equally divided between Frank, Vertner and yourself. I make no formal will, but the above is the way that I want what little remains from the wreck of my property shall go." Signed, A. K. Woolley.

Madison C. Johnson acquired by purchase, or in some other manner, the note for \$3,000 given to Mrs. Hearn, and held the note executed to himself for \$1,700. He having died, his executors, John Allen and Henry V. Johnson, instituted this action to enforce the mortgage liens for the two debts, and the chancellor directed the sale of the entire one hundred and sixty-six acres, upon the ground that the power of appointment had been exercised by the original conveyance of the land from A. K. Woolley to Payne, and the principal question in this case is, was the moiety in which A. K. Woolley had only a life estate subject to the payment of the notes sued on by reason of the mortgages executed to secure them?

It is plain that all the instruments of writing by which

liens were created on this entire share allotted to A. K. Woolley were in the nature of mortgages, and no attempt was at any time made to pass the absolute fee, but, on the contrary, the intention to do so is negatived by the two writings, that upon their face create only an equitable right on the part of the two creditors by which a lien is created to pay the grantor's debts. This lien may be enforced, but only to the extent of the interest of A. K. Woolley in the land devised to him by his mother. This he purported to convey, not only by the mortgages to Johnson and Mrs. Hearn, but by the original conveyance, to John B. Payne, passing to the latter "all his right, title, interest and claim in and to the estate known as the Howard's Grove estate." What right or title did he then have may be the proper subject of inquiry, and what title was intended to be passed by the conveyance to John B. Payne. The will of Mrs. Woolley had then been admitted to probate and, under its provisions, her son, Aaron K. Woolley, had a fee in one moiety of his share and a life estate by express terms in the other. The parties were attempting to convey only what title the grantor, Aaron K. Woolley, had, and instead of exercising the power of appointment given him by the will, he was reserving it by the writing executed to him by Payne at the same time this absolute deed, intended only as a mortgage, was executed.

It may be argued that the creditor, Mrs. Hearn, had no notice of the writing given by Payne to Woolley, showing that the deed to Payne was only to secure him in his liability for Woolley, and seeing the deed to Payne of record had the right to assume that it passed the absolute fee. The right, title and interest of the grantor was intended to be conveyed, and the creditor parting with his money

could easily have ascertained, by an examination of the will of Mrs. Woolley, the nature and extent of her son's interest. There was no attempt by any language used in the deed to Payne that would indicate the exercise of the power of appointment, or an intention to do so, but only a purpose to pass all the title the grantor had in the land, and nothing more.

The execution of the power must be in express terms, or by necessary implication, and following the well-settled rule on the subject, it can not be said that the writing or conveyance to Payne was an execution of the power.

In *Funk v. Eggleston*, 92 Ill., 515, it is said: "The intention to execute the power must be apparent and clear, so that the transaction shall not be fairly susceptible of any other interpretation; for if it be doubtful under all the circumstances, that doubt will prevent it from being deemed an execution of the power. But it is not necessary that the intention to execute the power should appear by express terms or recitals in the instrument. It is enough that it shall appear by words, acts or deeds demonstrating the intention." (*Blagge v. Miles*, 1 Story, 426.)

Recognizing this doctrine, it can not be maintained that the incumbrance placed upon the property by the donee of the power was an appointment, or intended as such. Nor was A. K. Woolley invested with a fee by reason of the general power given him to dispose of that part of the devise in which, by express terms, he held an estate for life. Chancellor Kent says that a devise of an estate generally or indefinitely, with the power of disposition, passes the fee, but this is qualified by saying, "unless the testator gives to the first taker an estate for life only and annexes to it the power of disposition. In such a case the

express limitation for life will control the operation of the power and prevent it from enlarging the estate into a fee." (Kent's Com., vol. 4, 520; McCullough's Adm'r v. Anderson, 90 Ky., 126.)

The power of disposition exists in this case because the donee of the power had only a life estate and must exercise the power of appointment, else the estate passes as directed by the will of Mrs. Woolley.

We have referred to the rule by which courts are to be governed in determining whether or not a power of appointment has been exercised, but that rule with reference to a general devise or bequest has been changed by our statute as to wills. It provides: "A devise or bequest shall extend to any real or personal estate over which the testator has the discretionary power of appointment, and to which it would apply if the estate was his own property, and shall operate as an execution of the power unless a contrary intention shall appear by the will." (General Statutes, chapter 113, section 22.) This provision is taken from the English Statute of Wills, and, as Judge Story says in a note to *Blagge v. Miles*, has dispensed with "the refined and subtle distinctions in relation to the execution of powers."

The will of the testator, A. K. Woolley, is set forth in the petition to subject this property, as well as the other writings referred to, and the question arises, was this will in execution of the power? It is contended it is not, because it shows upon its face that such was not the intention of the testator, for the reason he only disposes of his estate—"what *little property* I have after the payment of my debts I devise. . . . I make no formal will, but the

above is the way I want what little remains from the wreck of my property shall go."

The right to dispose of this life estate by will so as to pass the fee is unquestioned, and if this had been the testator's own estate it would certainly pass under this provision of his will. He could dispose of it as he pleased, and was, when executing the power, passing to his devisees a perfect title. What he regarded as his estate was that, doubtless, over which he had complete control, and having mortgaged the estate in which he held the fee, knew full well there could be but little left of *his estate*. The devise, by the terms of the statute, *of what little he had*, carried with it the real estate over which he had the discretionary power of appointment, and the fact of his devising "*what little property he had*," does not negative the idea of his intention to pass by his will this life estate, and if it *had been his own property*, in the language of the statute, it would have passed by its provisions. It is said that the will confines the devise to the property of the testator. If so, then by the statute the title to this life estate passes, for if not, a general devise of what the testator owns must be held not to pass that over which he has this discretionary power of appointment. It is argued that a power of this sort is not property, and while this may be so, by this statute it passes as property from the donee of the power to his devisee under a devise of *all the testator owns*. It was not originally liable for the debts of the donee of the power, but he can make it so, and having borrowed this money for his own purposes, we can not well see why he might not have intended to charge this estate with the payment of his debts. The will being in execution of the power, it is thus evident that these appellees hold no lien

Payne, &c., v. Johnson's Ex'ors.

on that part of the share of Aaron K. Woolley in which he held a life estate. The testator makes it liable for the payment of his debts, and here is in fact a devise to creditors who are entitled, in so far as this record shows, to receive the proceeds of sale in proportion to their respective claims.

It is argued that some of the borrowed money was applied to the extinguishment of liens on this land created by the original testatrix, and the creditor should, therefore, be substituted to the rights of the lienholder. This can not be done. The creditor took indemnity by way of mortgage, and obtained all he bargained for in that way, and therefore has no priority over other creditors in the one-half of this land.

While all creditors are not necessary parties to an action by an administrator for the settlement of an estate, still they are entitled to be heard, and in a case like this, with no one representing them, and their debts a charge upon the realty, they, or some of them, were necessary parties to the action enforcing this lien. A judgment has been rendered affecting those who have priority in the distribution of assets arising from the sale of this land, and should have been heard.

The judgment is reversed, with directions to set aside the sale, and for proceedings consistent with this opinion.

To petitions for rehearing and for modification of the opinion Judge Pryor delivered the following response of the court:

Counsel, in his petition for a rehearing, calls the attention of the court to that part of the opinion in which it is stated "it was not insisted by counsel that the mortgage to M. C. Johnson, &c., was an exercise of the power of disposition by A. K. Woolley," and says the point was directly made by him, etc. This criticism of the opinion

is just, as it is plain from the brief of counsel that such was his contention, and the court has therefore stricken from the opinion so much of it as alluded to the concession of counsel on that subject.

As to the revivor against or in the name of the widow and children of Frank Woolley or his personal representative, we have to say, in view of the character of the litigation, the opinion must affect all interested, and when the case returns the revivor should be allowed, and the opinion is modified to that extent.

In this action the only question was, were the mortgages, or other writings, executed by A. K. Woolley in execution of the power conferred by the will of his mother? This is not an action for a settlement in the nature of a creditor's bill, but one ignoring the rights of creditors who were entitled to participate in the distribution of A. K. Woolley's estate; and a sale of the remainder interest (so far as one-half of A. K. Woolley's interest is concerned) under a writing that passed no title, and was not, until the power was executed, subject to the debts of A. K. Woolley. The mortgages were passing an equitable interest that at the time belonged to others than the grantor. R. W. Woolley, as appears from the record, is a creditor, and entitled to be heard as to the merits of his claim, and under such circumstances we adhere to the opinion that the sale should be set aside.

The opinion is asked to be reopened as to whether or not the will of A. K. Woolley was an exercise of the power given him by the will of his mother. That question was presented and discussed in the brief of the appellants, and was made necessary as a guide for the chancellor in the court below. The devisees of A. K. Woolley were before the court, and we are not inclined to modify the opinion in that regard.

The petitions for a rehearing and modification are each and all overruled except to the extent indicated.

Volz v. Chesapeake, &c., R. Co.

CASE 31—PETITION ORDINARY—DECEMBER 9.

Volz v. Chesapeake, &c., R. Co.

APPEAL FROM CAMPBELL CIRCUIT COURT.

FELLOW-SERVANTS.—A master is not liable for an injury to one of his servants by the negligence of another servant of the same grade or rank and engaged in the same field of labor, although the negligence was gross.

The members of a crew of workmen engaged under the employment of a railroad company in driving piles on the road of the company were co-equals in the same field of labor, and therefore the company is not liable for an injury to one of the crew by the negligence of another.

L. J. CRAWFORD FOR APPELLANT.

1. Gross negligence makes employer liable even for act of fellow-servant of plaintiff. (Wagner v. Wetmore, 12 Ky. Law Rep., 638; Greenwood v. McHenry Coal Co., 14 Ky. Law Rep., 336; Doyle v. Swift's Iron & Steel Works, 5 Ky. Law Rep., 59; L. & N. R. Co. v. Robinson, 4 Bush, 539; L. & N. R. Co. v. Filburn, 6 Bush, 575; L. & N. R. Co. v. Brooks, 83 Ky., 135; L. & N. R. Co. v. Moore, 83 Ky., 675.)
2. Appellee is liable if appellant's injuries were caused by the negligence of appellee's servants or agents superior to or in control of appellant. (L. & N. R. Co. v. Moore, 83 Ky., 675.)
3. Appellee is liable for the acts of a fellow-servant of appellant if negligent in the selection and retention of such fellow-servant. (L. & N. R. Co. v. Moore, 83 Ky., 675; C. M. & St. Paul R. Co. v. Ross, 112 U. S., 377.)
4. Was the engineer a mere fellow-servant of appellant? (See L. & N. R. Co. v. Collins, 2 Duv., 114; Fort Hill Stone Co. v. Orme's Adm'r, 84 Ky., 183.)

GEORGE WASHINGTON FOR APPELLEE.

1. If an employe incurs a risk that is as well known to him as to his superior officers, and an injury results, he can not look to the railroad for compensation. (L. & N. R. Co. v. Shivel's Adm'r, 13 Ky. Law Rep., 903; 2 Thompson on Negligence, p. 1008; Bogenschutz v. Smith, 84 Ky., 338; Louisville, &c., R. Co. v. Cavens' Adm'r, 9 Bush, 566; Cooley on Torts, 542.)
2. Where two servants are in the same field of labor and in the same grade of employment, the one not superior or subordinate to the other,

Volz v. Chesapeake, &c., R. Co.

neither can recover of the master for an injury caused by the neglect of his co-laborer, although the neglect be gross or even willful. (83 Ky., 675; 84 Ky., 173; Casey's Adm'r v. L. & N. R. Co., 84 Ky., 79.)

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

The appellant was a member of a crew of workmen engaged in driving piles on the road of the appellee. Through the gross negligence of a fellow-workman his arm was crushed and cut off while "ringing" a split pile by the premature fall of a hammer under the control of the fellow-workman. The foreman in charge of the crew was in nowise at fault or negligent upon the occasion of the accident.

Upon the conclusion of the testimony offered by the appellant, showing the state of case indicated, the court peremptorily instructed the jury to find for the appellee, and the question involved on this appeal is the correctness of that ruling; in other words, the question is whether the employer is to be held liable to his employe for an injury caused by the gross negligence of a fellow-workman of the same grade or rank and engaged in the same field of labor with the injured employe. The appellant cites a number of cases of this and the Superior Court in support of his contention; and while we think the rule is clearly settled against him, we will review some of the authorities on the subject. In all cases, the principle upon which the employer is held liable is said to be that of agency—what he does through another he does himself. As to strangers, therefore, railroad companies are held liable for the negligence of their employes, whatever may be the grade of the negligence. When, however, a workman enters upon this admittedly dangerous service, he must be held to assume the ordinary risk

incident to the service. This is true of him whether he be pile-driver, brakeman or conductor. He is presumed to know the perils of the service, and he knows that there will be want of ordinary care at times, by reason of which he may be injured. In other words, that there will occur, in the nature of things, "common blunders and ordinary negligence" on the part of those among whom he is associated. These contingencies he risks. But recurring directly to the question at issue, what risks do fellow-servants, working as co-equals in the same grade of service, take with respect to their negligent acts affecting each other?

Admidst all the confusion and diversity of opinion prevailing in the different courts of the States on the general subject of fellow-servants, we believe there is but one answer given to this question. The differences obtaining are with respect to the rules determining who are "fellow-servants." On all hands it is said that such servants, when of the same grade and engaged in a common field of labor, are not the agents of the company with respect to each other. Beginning with the first Kentucky case, *Louisville & Nashville R. Co. v. Collins*, 2 Duv., 114, it is said: "Among common laborers, constituting a distinct class, all standing on the same platform of equality and power, and engaged in a merely incidental, but independent service, no one of them, *as between themselves and his co-equals*, is the corporation's agent; and therefore it is not, on the principle of agency or otherwise, responsible for damage to one of them resulting from the act or omission of another of them, although each of the company's employes would be its agent as to entire strangers to it." That case seems directly in point, and apparently

precludes the right of appellant to recover in this case.

In the case of *Louisville & Nashville Railroad Company v. Robinson*, 4 Bush, 508, and which is relied on by the appellant, the question was whether the company was liable to its brakeman for damage resulting to him by reason of the gross negligence of its engineer, and it was held that although the engineer and the brakeman were in the same line of service, and for that reason must be presumed to have mutually undertaken to risk all the contingencies which the ordinary skill and care of each other in his line of service could not avert; yet "this implied understanding between the company and its employes in the same class of service does not, as adjudged in the case of *Collins* (2 Duv., 114), exonerate the company from liability for damage resulting to one of such co-agents from the extraordinary or gross negligence of another of them." This was upon the principle decided in the *Collins* case, that it was the duty of the corporation to provide, among other things, a competent and faithful engineer, and those who were subordinate to him could not reasonably be presumed to expect or to hazard his gross negligence.

The rule in nearly all the States for determining who are fellow-servants is based on the character of the act being performed by the neglectful employe, and is not determined from his grade or rank or that of the injured servant. If it is an act that the law implies a contract duty upon the part of the employer to perform, then the offending employe, whatever may be his grade or rank, or by whatever name he may be designated, is not a servant, but an agent; but as to all other acts they are fellow-servants. These contract duties are said to be to furnish

suitable machinery and appliances, and keep them in repair, to select and retain sufficient and competent servants, and to establish proper rules and regulations for the safety of employes, such as keeping its road-bed clear of obstruction as far as practicable, etc.

This rule was never adopted in Kentucky, or, rather, this limitation on the responsibility of the principal was never admitted here, but from the start was extended so as to apply the rule of law applicable to principal and agent to a system based on the relation of the offending employe to the injured one; that is, his grade of service in point of being superior in power or authority to the other. And, still further extending the old rule, our courts said that employes working in a distinct and independent department, although in the same line of service—as engineers, operating different trains—were co-agents and not fellow-servants.

So, in *Louisville & Nashville Railroad Company v. Filburn's Adm'r*, 6 Bush, 574—a case relied on by the appellant—the employer was held liable for the death of the engineer caused by the gross negligence of a “section boss,” whose duty it was to keep the road free from obstructions. While this case was put within the rule announced in the *Collins* case, of liability for the gross negligence of co-agents in a distinct line of service, it may be observed that it easily falls within even the conceded rule by which it is made the “contract duty” of the company to furnish and keep its appliances—its road and bridges, etc.—in repair, and enforce such regulations as will afford reasonable protection to its employes.

In the case of *Louisville, Cincinnati & Lexington Railroad Company v. Cavens' Adm'r*, 9 Bush, 559,

the question was as to the liability of the company for damages resulting in the death of an engineer on one of its trains by reason of the gross and willful neglect of a conductor on another of its trains. And it was held that the company was liable even upon the assumption—though such an assumption was not held tenable—that there was no distinction between the offices of conductor and engineer, and that they were in the same line of service. They were working in distinct and separate departments and were co-agents. But it was there said that “where a number of persons contract to perform service for another, the employes not being superior or subordinate the one to the other in its performance, and one receives an injury by the neglect of another in the discharge of this duty, they are regarded as substantially the agents of each other, and no recovery can be had against the employer. . . . Public policy requires that when the laborers are co-equals and engaged in laboring in the same field or on the same railroad train or in any other employment, that each should exercise proper care in the conduct of the business, and look to it that his co-laborer does the same thing; and when he is told that this care and prudence is his only remedy against danger from the negligence of those employed with him, it not only makes him the more careful, but stimulates him to see that others exercise the same caution.”

The case of Louisville & Nashville Railroad Company v. Brooks' Adm'r, 83 Ky., 129, relied on by the appellant, was where a brakeman lost his life by reason of the gross negligence of a conductor on the same train. It was held that the engineer and brakeman were not co-equals, and the employer was held liable on that principle.

In the case of *Louisville & Nashville Railroad Company v. Moore*, 83 Ky., 675, the question was as to the liability of the road for the gross negligence of a fireman, acting temporarily as an engineer, causing the death of a brakeman on the same train. It was held that the rule of principal and agent applied, and the company was held liable. In the course of the argument the court said: "Where a number of persons enter a common employment for another, all being upon a common footing and none superior or subordinate to the other, and one receives an injury by the neglect of another in his discharge of the undertaken duty, they are regarded as agents of each other, and no recovery can be had against the employer."

In *Casey's Adm'r v. Louisville & Nashville Railroad Company*, 84 Ky., 79, the injured employe was a common laborer as well as the servant injuring him, and the court refused to apply the principle of agency, saying that "the risk is taken by these parties in the same field of labor and in the same grade of employment as to all injuries that may happen by the neglect of their co-laborers."

In the case of *Fort Hill Stone Company v. Orm's Adm'r*, 84 Ky., 183, the deceased, Orm, and the person or persons to whom his death was attributable, were co-equals and engaged in a common employment. It was held that they must "be regarded as the agents of each other, and no recovery can be had against the employer."

In the last two cases cited, the liability of the companies was sought to be fixed on the ground of the gross and willful negligence of the servants, and the relief was

Bird, &c., v. Board of Commissioners of Kenton County.

denied, not because the acts of the offending servants did not constitute gross and willful negligence, but because, as co-equals in the common employment, they were regarded as the agents of each other, and not of their employers.

The abstracts of the cases of *Wagner v. Wetmore*, 12 Ky. L. R., 638, and of *Greenwood v. McHenry Coal Company*, 14 Ky. L. R., 336, decided by the Superior Court, and cited with confidence by the appellant, seem to support his contention, but without the opinions before us we can not undertake to review them, and it is more than probable that they conform to the principles of the numerous cases herein cited.

Judgment affirmed.

CASE 32—PETITION EQUITY—DECEMBER 9.

Bird, &c., v. Board of Commissioners of
Kenton County.

APPEAL FROM KENTON CIRCUIT COURT.

INTERPRETATION OF STATUTES.—While the general rule of interpretation is that full effect must be given to every word in a statute, still, where the object of the Legislature is plain and its intent gathered certainly from the whole context, the use of a single word that would render the act meaningless and absurd should be disregarded; or, if it is manifest from the context that such a word has been carelessly used for another word, the word intended should be substituted if necessary to give effect to the legislative purpose as gathered from the whole law.

An act of the Legislature creating a taxing district and providing for the imposition of a tax to pay the cost of constructing turnpike roads provided that the "width" of the macadam shall not be less than eight inches nor more than fifteen inches. *Held*—That as a liberal interpre-

95	195
108	78

95	195
110	636

95	195
128	433

95	195
133	311

Bird, &c., v Board of Commissioners of Kenton County.

tation of the word "width" would lead to an absurdity and defeat the purpose of the act, in construing the statute the word "depth" will be substituted, it being manifest that was the word intended.

O'HARA & BRYAN FOR APPELLANT.

1. The power of the court is limited to the reading of the statute as it is, and it can not alter or change the language to conform to what it may suppose the Legislature intended contrary to the unambiguous meaning of the words used. Nor can anything found in the original and unsigned bill be resorted to for the purpose of aiding in the construction of the act. (Field v. Clark, 148 U. S., 649; Sherman v. Story, 80 Cal., 258, 276; Norman, Auditor, v. Ky. Board of Managers, &c., 14 Ky. Law Rep., 529; s. c., 98 Ky., 537.)
2. A whole county can not be taxed for a purely local purpose affecting beneficially only a small portion of the county and its people. (Graham v. Conger, 85 Ky., 687.)

WM. GOEBEL FOR APPELLEES.

It is obvious that the use of the word "width" is a clerical error in the enrollment of the bill, and that the meaning is that the *depth* of the macadam shall be not less than eight nor more than fifteen inches. And the legislative intent being clear, clerical errors, and even errors of more gravity, are ignored or corrected by the courts, and the legislative intent declared to be the law and carried into effect. (Endlich on Int. of Statutes, secs. 245, 251, 264, 265, 295, 298, 299, 300, 301, 317, 318, 319.)

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

The taxing district as laid off by the Legislature was to equalize the burden with the taxpayers, and we perceive nothing in the act that could produce such an inequality as would induce or authorize this court to interfere. Taxing districts created for turnpike purposes, whether constituting the whole or a part of a county, have been upheld by this court in many instances, and the only question proper for consideration in this case is, shall this court, when a statute has been enacted of such public utility as in this case, look to the plain letter of the act, and following literal construction or meaning of certain words, nullify the entire statute, making the

Bird, &c., v. Board of Commissioners of Kenton County.

legislative intent an absurdity, or shall the court look to the entire act with a view of carrying out the legislative will, and attach such a meaning to the language used as will uphold the statute?

Courts in such cases will look to the object of passing the law, and if it can be discovered in its provisions will not suffer it to be defeated. Under this enactment the voters of the turnpike district have favored the law, and bonds have been issued and sold, and the money expended in constructing turnpike roads, and because of that which is a mere clerical error, and which error, upon reading the act, must necessarily correct itself, it is insisted this court should declare the whole act invalid, or require the commissioners to comply with the strict letter of the law. In the eighth section of the act it is provided *that the width of the macadam shall not be less than eight inches nor more than fifteen inches.*

It is manifest that such a provision is absurd, and it is therefore insisted the act should be held invalid. The section should read, "the depth of the macadam shall not be less than eight nor more than fifteen inches," and this will carry into execution the legislative will.

"The right rule of construction is to intend the Legislature to have meant what they have naturally expressed, unless some manifest incongruity would result from doing so, or unless the context clearly shows that such a construction would not be the right one." (Potter's Dwarries on Statutes, 207.)

"In interpreting the law, judges are to explore the intentions of the Legislature, yet the construction to be placed upon an act of Parliament must be such as is warranted by, or at least not repugnant to, the words of

Bird, &c., v. Board of Commissioners of Kenton County.

the act. But they must not, in order to give effect to what they may *suppose* to be the intention of the Legislature, put upon the provisions of a statute a construction not supported by the words, though the consequence would be to defeat the act." (Potter's Dwarrris, 204.)

Under this rule, it is urged this court has no power to say that in using the word width the Legislature intended to use the word depth, and it is therefore necessary to determine how this rule is to be applied. When the object of the Legislature is plain and its intent gathered certainly from the whole context, the use of a single word that would render the act meaningless and absurd should be disregarded. Mr. Endlich, in his work on the Interpretation of Statutes, says: "When the language of a statute in its ordinary meaning and grammatical construction leads to a manifest contradiction of the apparent purpose of the enactment, to inconvenience or absurdity, hardship or injustice, not presumably intended, a construction may be put upon it which modifies the meaning of the words and even the structure of the sentence. This is done sometimes by giving unusual meaning to particular words. Sometimes by altering their collocation, or by rejecting them altogether, or by interpolating other words, the court having an irresistible conviction that the modifications thus made are mere corrections of careless language, and give really the true intention." (p. 400, sec. 295.)

The general rule of construction is that full effect must be given to every word in a statute; still, if no sensible meaning can be given to a word, the authorities are that it should be disregarded or eliminated from the statute.

In the Metropolitan Act it was provided "that no road

Louisville & Nashville Railroad Co. v. Williams.

shall be formed as a street for carriage traffic unless widened to forty feet, or unless such street shall be opened at both ends." The word *or* was read *nor*, the intention being that both conditions should be complied with.

The word *venire* used in a statute was read *venue*; *final* judgments for penal judgments. (Endlich on Int. of Statutes, 436.)

In the case before us the legislative intent becomes so apparent that where words have been carelessly inserted that lead to an absurdity there is no reason why such a judicial interpretation should not be placed upon the statute as will effect its object, the court being satisfied the use of the word was a mere inaccuracy, and the modification made is in furtherance of the legislative purpose.

The judgment below is affirmed.

CASE 33—PETITION ORDINARY—DECEMBER 12.

Louisville & Nashville Railroad Company
v. Williams.

95	199
1133	167
1134	660

APPEAL FROM KENTON CIRCUIT COURT.

1. **RAILROADS—DUTY AS TO INSPECTION OF FOREIGN CARS.**—Where one railroad company receives cars of another company on its line of road for transportation, it is the duty of the company taking them to make careful superficial inspection of their condition such as an ordinarily prudent man engaged in such business would make for the protection and safety of the employees required to handle the cars, and when there is a patent defect, and an injury occurs to an employe by reason of the defect that is unknown to him, the company is responsible. And this rule applies not only where the foreign car is out of repair, but where it is patent that it is so constructed as to render it more than ordinarily dangerous when attempting to couple it with other cars of different construction.

Louisville & Nashville Railroad Co. v. Williams.

- 2. CONSTITUTIONAL LAW—DUTY OF ONE COMPANY TO RECEIVE CARS BELONGING TO ANOTHER.**—Although section 213 of the new Constitution requires railroad companies to receive for transportation cars belonging to other companies, still if such cars are so constructed as to render it unsafe to handle them in the ordinary mode, it is the duty of the company to refuse to receive them.

J. W. BRYAN FOR APPELLANT.

The car by which plaintiff was injured being a car from another railroad, if the defect was one of construction, arising from the way in which the car was built, and in consequence of that defect plaintiff was injured, defendant is not liable therefor. When the defendant received and undertook to transport this car, if it was in good order, it was but obeying the mandate of the Constitution, and negligence can not be imputed to it for so doing. (Const. of Ky., sec. 213; Railroad Co. v. Smithson, 45 Mich., 212; s. c., 7 N. W., 791; Hathaway v. Railroad Co., 51 Mich., 258; s. c., 16 N. W. Rep., 634; Baldwin v. Railroad Co., 50 Iowa., 680; Railroad Co. v. Flannigan, 77 Ill., 365; Railroad Co. v. Black, 88 Ill., 112; Keely v. Railroad Co. (Wis.), 28 N. W. Rep., 890; Thomas v. Missouri Pac. R. Co. (Mo.), 6 American Railroad & Corp. Rep., 197.)

B. D. WARFIELD OF COUNSEL ON SAME SIDE.

WM. GOEBEL FOR APPELLEE.

A railroad company is not bound to take the cars of another company if they are known to be defective and unsafe. And it owes the duty of inspection as master, and is at least responsible for the consequences of such defects as would be disclosed or discovered by ordinary inspection. (Shearman & Redfield on Negligence, sec. 196; Gottlieb v. New York, &c., R. Co., 100 N. Y., 462; s. c., 24 Am. & Eng. Railroad Cases, 421; Goodrich v. New York Central, &c., R. Co., 116 N. Y., 398; s. c., 41 Am. & Eng. Railroad Cases, 259.)

Section 213 of the State Constitution was not intended to change this rule. The only reasonable construction of that section, so far as railway cars are concerned, is that it applies only to such as are not defective and not unfit for use.

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

The appellee, Daniel Williams, while in the employ of the Louisville & Nashville Railroad Company as a brakeman, in the attempt to couple two freight cars had his hand so badly mashed as to render the amputation of his arm necessary below the elbow. He instituted this

Louisville & Nashville Railroad Co. v. Williams.

action for the injury received, alleging gross neglect on the part of those over him, and whose orders he was required to obey, and recovered the sum of \$3,500 in damages. His recovery was based on the alleged defective condition of one of the cars he was engaged in coupling, the defect causing the injury. He avers the defect was known to the company or could have been known by the exercise of ordinary care and inspection.

The defect consisted, as is alleged and proven, in a long iron pin or bolt projecting from the dead wood of the car near the place of coupling, and that in making this coupling, his coat sleeve was caught by the pin, preventing him from withdrawing his hand, which was caught between the bumpers and mashed.

The appellant relies in his argument on two grounds as a defense: First, that the defect, if any, consisted in the construction of the car that was being coupled. That it belonged to another and distinct corporation, coming to the defendant's road laden with merchandise, and the bolt was not loose, nor did it project further than was intended in its original construction. That no defect existed, but the extension of the bolt was the manner in which the car was built, and it being the duty of the defendant to receive and transport over its line of road the car with the merchandise to its place of destination, the company could not be held liable for the mode in which the car was constructed. If the defect was one of construction, the car belonging to another company and the appellant compelled to receive it by reason of section 213 of the State Constitution, no liability can arise.

The second is that of contributory neglect on the part of the appellee.

Louisville & Nashville Railroad Co. v. Williams.

The answer filed merely puts in issue the defective condition of the car, and there is no averment that the car belonged to another and distinct corporation, or that the defect was one of construction, if any existed.

The testimony, however, shows that this car was the property of another railroad company, the New York, Lake Erie & Western, and the appellant received it upon its line for the purpose of transporting the merchandise to its owner, and as the case seems to have been tried on the issue arising from the testimony, as to the liability of one railroad company for the condition of the cars of another company when receiving the cars of the latter on its line of road, it may be proper to determine the question, as both counsel present it.

It seems to us the constitutional provision by which one railroad company is compelled to take cars of another over its line can have no bearing on this case. If the cars were in an unsafe condition, or were so defective in their construction as to render it unsafe to those who are required to handle them, it is the duty of the company to refuse to receive the car, if such defects exist, and no other construction, it seems to us, can well be given this clause of the Constitution.

The brakeman had been employed to discharge a duty in coupling cars that was dangerous whenever attempted, and when entering into the service he assumed all the risks ordinarily incident to such an undertaking, and, at the same time, he had the right to assume that all the appliances would be afforded him to enable him to faithfully discharge this duty. It is immaterial whether the car with the merchandise belonged to the one corporation or the other; it was the duty of the appellant, by inspec-

Louisville & Nashville Railroad Co. v. Williams.

tion or otherwise, to ascertain whether or not the car was in such a condition as that it could be safely handled by its subordinates. This care to be exercised is not such as would require the company receiving the car to test the strength of the metal or the material out of which it was constructed, or to make that rigid examination into the car's condition as could only be arrived at by actual tests, but the care must be of at least an ordinary inspection by one competent to know whether or not the car is in a safe condition for transportation and can be handled by a subordinate who will exercise ordinary care without danger.

The cases relied on by counsel for the appellant are not inconsistent with the right of recovery in this case. The case of *Baldwin v. The C., R. I. & P. R. Co.*, reported in 50 Iowa, 680, was where the defendant received upon its road a car of another road that was equipped as cars in general use, and it was claimed that the injury would not have happened if the latest and most approved appliances had been used in coupling. The court said that as such cars from which the injury originated were in general use, although not constructed upon the most approved plan, the employe must be presumed to have assumed such risks when entering into the employment.

In the case of *Indianapolis, &c., R. Co. v. Flanigan*, 77 Ill., 365, the court adjudged that the company was not liable for a personal injury to the employe while coupling cars having *double buffers*, simply because a higher degree of care is required in using them than in those differently constructed.

The cases referred to by counsel all proceed on the idea

Louisville & Nashville Railroad Co. v. Williams.

that the employe assumed all the ordinary hazards arising in the performance of what he has undertaken.

These cases as well as others cited by counsel for the appellant are in harmony with the rule requiring the company to furnish safe cars and machinery in the conduct of its business for the use of its subordinates or employes. It was the duty of the appellant to have cars belonging to another company, when coming on to its road, inspected, and if there is such a defect as renders it dangerous to handle them in the ordinary mode, to refuse to take them.

It is not expected of a brakeman that he shall make an inspection for himself, as it must constantly happen that he is required to couple and uncouple cars without time afforded him to make even a cursory inspection. He has the right to rely on his principal to furnish what is safe for his use. There are different appliances used for coupling and uncoupling cars, and in the manner of constructing cars; still if such appliances are those ordinarily used, although they may differ from those used by the road on which the injury occurs, the company is not responsible, if the difference in the appliances alone produces the injury. A car, however, may be so constructed or built as to render it more than ordinarily dangerous when attempting to couple it with other cars of different construction, and when this is patent the company must see to it that the danger is removed.

In *Shearman & Redfield on Negligence*, sec. 193, third ed., the rule is laid down as follows: "The duty of the master to inspect materials, machinery, etc., used by his servants in the course of his business extends not only to those things which are his property, or are directly furnished by him, but also equally to all things which it

Louisville & Nashville Railroad Co. v. Williams.

becomes the duty of his servants to use in the course of their employment. Thus, when a railroad company requires its servants to handle cars not belonging to it, or move trains over a track belonging to another company, its obligations, superficial as to inspection, are the same as though such cars and track were its own."

In the case of *Gottlieb v. New York, &c., R. Co.*, a brakeman was seriously injured while coupling cars. The bumpers of the cars were not wide enough when the draw heads passed one another to protect the employe from injury. The defect was in the construction of the car, but so obvious that one, by an ordinary inspection, could see the defect. The cars also belonged to another company. The court in that case said: "It is not bound to take such cars if they are known to be defective and unsafe. Even if not bound to make tests to discover secret defects, it is bound to inspect foreign cars, just as it would inspect its own cars. It owes the duty of inspection as *master*, and is at least responsible for the consequences of such defects as would be disclosed or discovered by ordinary inspection. Employes can no more be said to assume the risks of such defects in foreign cars than in cars belonging to the company." (100 N. Y., 462.)

In *Goodrich v. New York Central, &c., R. Co.*, the same doctrine was recognized, the court saying: "This duty of examining foreign cars must obviously be performed before such cars are placed in trains upon defendant's road and furnished to its employes for transportation. When so furnished, the employes whose duty it is to manage the trains have the right to assume that, so far as ordinary care can accomplish it, the cars are equipped with safe

Louisville & Nashville Railroad Co. v. Williams.

and suitable appliances for the discharge of their duty," etc. (41 Am. & Eng. Railroad Cases, 259.)

The rule deducible from all the cases is this: That when one company receives cars of another company on its line of road for transportation, it is the duty of the company taking them to make careful superficial inspection of their condition such as an ordinarily prudent man engaged in such business would make for the protection and safety of the employes required to handle the car; and when such defects are patent and an injury occurs to the employes by reason of the defect that is unknown to the party injured, the company is responsible.

There are but two witnesses in the case—the party injured and an employe of the company. The plaintiff states that he was injured by that projecting bolt that had become loosened. The witness for the company states that he examined some of the cars after the accident and found no such state of case as that detailed by the plaintiff. That the bolt did project, but this was owing to the mode of constructing such cars. Whether they were such as could be coupled safely with other cars does not appear, nor is there any testimony showing that any inspection had ever been made of this car by any one before or after receiving it, and not until the injury was inflicted.

If the testimony of the railway company is in conflict with the plaintiff's statement, it was with the jury to say which one they believed, and unless the court erred in giving the law of the case, the judgment must be affirmed. The defense asked the court to say that if the injury was caused from the mode in which the car was constructed, they must find for the defendant. This the court refused to give, and properly, for the reason, if no other, that the

Louisville & Nashville Railroad Co. v. Williams.

construction might have been of such a character as to render it dangerous to couple these foreign cars with the cars of the defendant, and besides, the court had given the law of the case in the instructions for the plaintiff. The court said, in effect, to the jury that if they believed this iron bolt projected from the dead wood of the car the plaintiff coupled, and that this was such a defect in said car as made it unsafe and dangerous to couple, and that by reason of said projecting bolt the injury occurred, and that the servants of the defendant whose duty it was to inspect the car knew, or by the exercise of ordinary care could have known, that said bolt did project from the dead wood for a time long enough before plaintiff was injured to have enabled the servants of the defendant, by the exercise of ordinary care, to remove the bolt or pin, or repair the defect, if any existed, etc., they must find for the plaintiff.

The question of contributory neglect was also submitted to the jury, under a proper instruction, and finding no error this judgment must be affirmed.

Mendenhall, &c., v. Tungate, &c.

CASE 84—CONTESTED WILL—DECEMBER 12.

Mendenhall, &c., v. Tungate, &c.

APPEAL FROM GRANT CIRCUIT COURT.

1. IN THIS CONTEST OF A WILL by which the only child of the first-born of the testatrix was, without reason, pretermitted, the ground of contest being the want of testamentary capacity upon the part of the testatrix, the verdict of a jury "for the will" is set aside upon the ground that it is not supported by the evidence, the testatrix being a paralytic for whom everything done was first conceived by those around her, and her desires and intentions arrived at by asking her speculative questions, to which she could respond "yes" or "no," that being the extent of her ability to speak.
2. MANDATE.—In reversing the judgment of the circuit court upon the verdict "for the will," this court does so with directions to the court to render a judgment directing the county court to reject the paper in contest.

H. CLAY WHITE FOR APPELLANT.

1. The opinions of witnesses as to the capacity of one to make a will are not entitled to much weight; the facts from which their opinions are deduced are more satisfactory. (*McDaniel's Will*, 2 J. J. Mar., 387; *Hunt v. Hunt*, 8 B. M., 577.)
2. Soundness of mind in a testator in making a will is capacity to know his children and his estate, and to dispose of the same in a rational manner according to a fixed purpose of his own. (*Tudor v. Tudor*, 17 B. M., 891.)
3. The verdict should be set aside because not sustained by the evidence. (*Harrell v. Harrell*, 1 Duv., 208; 11 Ky. Law Rep., 708.)

JOEL C. CLORE OF COUNSEL ON SAME SIDE.

DICKERSON & WILLIS FOR APPELLEES.

1. The law presumes the testatrix to be of testamentary capacity and sane. (79 Ky., 607.)
2. The verdict will not be set aside unless palpably and flagrantly against the evidence. The same effect is given to verdicts in proceedings to probate a will as in civil suits. (*Broadbuss v. Broadbuss*, 10 Bush, 307.)
3. The finding of the jury that the testatrix had sufficient capacity to make a will is fully sustained by the evidence. (*McDaniel's Will*, 2 J. J. Mar., 341.)
4. To set aside a will on the ground of "undue influence" the influence

Mendenhall, &c., v. Tungate, &c.

must be such as to destroy free agency. (*Wise, &c., v. Foote, &c.*, 81 Ky., 11; *Turley v. Johnson*, 1 Bush, 116; *Broadbuss v. Broadbuss*, 10 Bush, 308.)

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

A paper purporting to be the last will and testament of Sarah A. Tungate, dated May 14, 1887, was offered for probate in the Grant County Court in March, 1891. Its probation was contested by a granddaughter of the decedent—her husband joining with her—upon the ground of want of testamentary capacity on the part of the alleged testatrix, and because of undue influence exercised over her by the favorite devisees. After a thorough hearing of the testimony and a painstaking examination of the authorities on the subject, the learned judge of the county court, in an elaborate opinion, rejected the paper. The propounders appealed to the circuit court, and upon trial there the jury, under unobjectionable instructions, found a verdict “for the will”; and from the judgment thereon the contestants have appealed to this court.

The facts, and they are most singular and interesting ones, are substantially these:

In 1883, the alleged testatrix was stricken with paralysis, caused by the rupture of a vessel in the brain, or by a clot on the brain. It rendered her unconscious. She was completely paralyzed, was almost lifeless, and remained in that comatose condition for some ten days or two weeks. A considerable portion of her brain—so testifies her attending physician—was involved, and she never improved much. She did regain the use of her left limbs, and her general health was in a large measure restored. Her appetite was good. She was speechless save she could use the words “yes,” “no” and “well,” the usual

Mendenhall, &c., v. Tungate, &c.

form of their use, being "yes, yes," "no, no" and "well, well." She was sixty-five years of age—a hopeless, bed-ridden, paralytic, requiring constant and patient nursing. In this condition she lived some seven years, and is said by some of the witnesses for the appellees to have taken a lively interest in what was going on around her. What was thought best for her by her attendants was done, though she managed to make her wants known by these monosyllables to a surprising extent. She never wrote a line after her paralysis, though she read some in her Bible. She could see and hear, and is said to have understood what was told to her. Her husband died in the spring of 1887, and she appeared depressed for some time thereafter. Tears came to her eyes when some intimate friends called to see her for the first time after his death. She was consulted as to what food she wanted, speculative questions being asked her with reference to the various articles. She appeared to remember dates, and if those talking in her presence would fix the wrong date to the age of one of the children, or to any incident of which she was supposed to have some recollection, she would say "no, no," and when the right date was fixed she would say "yes," or "yes, yes." Several of her neighbors testified to the fact that they believed her competent to understand the making of a will or other writing when read to her, and none of them testify against her sanity.

Her attending physician, and an attesting witness to the will, comes as nearly testifying against her capacity as any one not interested. He says, "I am satisfied that she understood in a measure what was said to her in regard to that will; I think she had will; I don't think her will-power was entirely lost. She could say 'yes'

and 'no' to interrogatories put to her by Mr. Dickerson, and she, I presume, understood them; I don't know. She never improved very much mentally. Nature had to make a terrible struggle for her to live at all." When asked if she had mind enough to understand the will, he said, "I think she had an idea of the drift of it; a vague idea; I don't know."

As indicated, her husband died in the spring of 1887. He had written his will in 1873, and on March 9th of the year of his death it was probated. By it the testator gave to his wife one-third of his real estate in fee and such portion of his personalty as the law would give her. Prior to this she owned no property. She left four children and a grandchild—the daughter of a deceased son—to all of whom before her affliction she was much attached. A son and daughter, both unmarried, lived with her, and a married daughter lived near by. These were with her constantly. A son lived in Texas. The granddaughter, recently married, lived some thirty-five miles away, and visited her grandmother occasionally.

The will of the husband was probated on the 9th of the month, and the one in contest was written five days thereafter. After reciting that the testatrix was of sound and disposing mind and memory, it provided: *First*, for the payment of all her just debts and funeral expenses. *Second*, for an equal distribution of her entire estate, real and personal, after the payment of her debts, among her four children, naming them, except the sum of one hundred dollars, which was given the granddaughter, Ella Tungate, and it provided, *Third*, that the granddaughter should not have any of the real estate, and only one hundred dollars of the personal estate, and this was to be

[Mendenhall, &c., v. Tungate, &c.]

paid to her as soon after the death of the testatrix as could be done. It is a matter of interest to note, first, how the idea of making this instrument originated, and if it be supposed that this invalid could have originated the conception, to note how she communicated that intention, and in this connection we quote the testimony of the son who was her constant attendant:

“Q. At whose request did I go down there, who notified me to come?”

(This question was asked by the draftsman of the will, who was conducting the trial of the case for the propounders.)

“A. I did.

“Q. How came you to do that?

“A. Well, sir, by her request.

“Q. Now tell the jury how she communicated that request to you, and all about it, as near as you can.

“A. Well, after pa's will was written here, I talked there in the room in regard to the will, that is, what was in it, and she kept going on for several days after that, and I kept guessing and guessing, and she kept pointing up this way, and I finally guessed what it was. I asked her if she wanted to make a will; she said, ‘yes.’ I asked her then if she wanted Dr. Lewis to write it; she said ‘no.’ I then asked if she wanted you to write it; she said ‘yes.’ I asked her if she wanted me to tell you so; she said ‘yes.’”

The draftsman found the testatrix, who was a stranger to him, in bed, and in the condition indicated by the other witnesses. He testifies that she could use only the three words, “yes,” “no” and “well,” but could see and hear. He says that he told her he had come at the request of

Mason to write her will, and asked her if she desired him to do so, and she answered "yes." He then asked her if she could hear distinctly all that was said to her, and she said "yes," and whether she could see, and she answered the same way. He told her that if he wrote the will, he didn't want to write anything except what she wanted, and until he got exactly what she wanted she must not agree to it. To his question whether she understood all this, she answered "yes."

The draftsman then labored some two hours, and by a series of speculative questions produced the paper offered. That he labored faithfully and honestly we have no doubt. She did not undertake to read the document, nor was any effort made to have her read it. It is not clear that she could have read it; but it was read to her perhaps twice.

Everything done was first conceived by those around her, and she was then asked a question to which she could respond by the use of the words "yes" or "no." No other means were resorted to toward ascertaining her desires.

It is evident at the start that the question of the integrity of those around the testatrix when the paper was written is a most important one in the case, and was probably the controlling circumstance in reaching the verdict obtained. The high characters of the draftsman and of the attesting witnesses were apparently at stake, and evidently overshadowed the real question at issue. We can not bring ourselves to the conclusion, after a careful examination of the evidence, that this paper—providing, without reason, for the pretermission of this grandchild, the child of the first-born—was the offspring of a disposing mind and memory. Rational disposition, fixedness of purpose,

Mendenhall, &c., v. Tungate, &c.

capacity to know the natural objects of her bounty and take a general survey of her estate are terms wholly inapplicable to the mental condition of the physical wreck under consideration. The mind revolts at the thought of it. These required mental conditions were wholly and necessarily absent, and the paper can not be regarded as coming up to the requirements of the statute or in accord with any adjudication on the subject under consideration, so far as we are advised.

The alleged testatrix, in our opinion, was not mentally competent to originate the conception of a will, and did not have the physical ability to dictate a disposition of her estate or communicate her intentions as the law requires.

The judgment is reversed, that further proceedings may be had consistent with this opinion.

To a motion for modification of the mandate Judge Hazelrigg delivered the following response of the court:

Under the views expressed in the opinion, nothing remains to be done in this case by the court below save to enter a judgment directing the county court to reject the paper in contest as the last will and testament of the decedent. And the motion of the appellant to have the mandate so issued is sustained.

DECISIONS

OF THE

COURT OF APPEALS OF KENTUCKY.

JANUARY TERM, 1894.

CASE 85—PETITION ORDINARY—JANUARY 4.

**Louisville & Nashville Railroad Company
v. Whitley County Court.**

95	215
124	475
95	215
1131	115
133	484

1. **RAILROADS—RIGHT TO DESTROY PUBLIC HIGHWAY.**—While the Legislature has the power to grant to a railroad company the right to take land already appropriated to another public use, yet such an intention will not be presumed, but must be shown by express words or by necessary implication. Therefore, a grant of power to lay out a railroad between certain termini where the precise course and direction are not prescribed, but are left to the corporation to be located between the termini, does not give authority *prima facie* to take the road-bed of a public highway as the track of the railroad or to destroy the highway by removing its support. And the fact that the corporation is authorized, in general terms, to construct "other branch roads," does not enlarge its power in this regard.
2. **A COUNTY** may maintain an action for injury to its public roads.
3. **DAMAGES FOR DESTRUCTION OF COUNTY ROAD—EXCESSIVE VERDICT.**—Where a railroad company in constructing its road cut through the outer base of a mountain and thus destroyed a county road running along the mountain side above the railroad, in an action by the county against the company to recover damages, a verdict for \$10,000 is not excessive, as the proof shows that a large section of the county is cut off from the county seat, and that whatever remedy may be found to relieve the people of that section, the cost will be largely more than the amount of the verdict.

J. W. ALCORN FOR APPELLANT.

1. If one grants a right of way for a railroad he is, by his grant, held to

Louisville & Nashville Railroad Co. v. Whitley County Court.

have consented to the consequences resulting from the proper use of the right of way. (*Hortman v. Lexington, &c., R. Co.*, 18 B. M., 221; *Wolfe v. C. & L. R. Co.*, 15 B. M., 410.)

And this rule should be applied to the plaintiff in this case, the county court being but the Commonwealth so far as this action is concerned, and so far as concerns its rights to the control, management and ownership of the public roads.

2. Even if we are not correct in this proposition, the peculiar circumstances here are such that it must be held that by necessary implication the Commonwealth assented to the natural consequences of building the railroad in that place, and that no duty devolved on the company to protect the property of the public from the consequences resulting from the proper building of the railroad there. (*McAboy v. Railroad Co.*, 107 Pa. St., 548; *C. & P. R. Co. v. Speer*, 6 P. F. Smith, 325; *Inhabitants of Springfield v. Conn. River R. Co.*, 4 Cush., 71.)
3. While a charter does not confer upon a railroad company the right to take a highway for its road-bed, unless that power is conferred in the charter by express words or by necessary implication, yet the power of the Legislature to grant such authority is well established. (*Inhabitants of Springfield v. Railroad Co.*, 4 Cush., 71; *Kenton County Court v. Bank Lick Turnpike Co.*, 10 Bush, 581; *Lawrence County Court v. Chatteroi R. Co.*, 81 Ky., 225.)
4. In such cases as this the plaintiff is only entitled to recover such damages as he could not, by his own act, have avoided. (*Sedgwick on Damages*, side page 95.)

J. H. TINSLEY AND K. D. PERKINS FOR APPELLEE.

1. A county may maintain an action for damages on account of an injury to a highway. (*Lawrence County v. Chatteroi R. Co.*, 81 Ky., 225; *L. & N. R. Co. v. Finley*, 7 Ky. Law Rep.; *Sedgwick on Damages*, secs. 69-75.)
2. The county has a vested right in its highways, and while it may be that under the right of eminent domain the Legislature would have the power to grant away this public franchise to one of still greater public utility, yet, in order to do this, the power would have to be clearly defined under the act; it can not be done by construction. (*Inhabitants of Springfield v. Conn. River R. Co.*, 4 Cush., 68; 18 How., 81; 91 N. Y., 552; *Boston & Albany R. Co.*, 58 N. Y., 574.)

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

In building its road through Whitley County, the appellant cut through the outer base of a mountain, and thus destroyed the county road running along the mountain

Louisville & Nashville Railroad Co. v. Whitley County Court.

side above and parallel to the railroad. The support below the county road being thus removed, landslides occurred, and the road was rendered impassable and useless. The county recovered damages to the extent of ten thousand dollars, and from that judgment this appeal is prosecuted.

It is contended by the appellant that, by virtue of its charter, it was authorized to construct a branch of its road to the Mississippi River, or any other branch it might desire, and having so acquired this right of eminent domain, it did not "devolve upon the company to construct a wall or erect any defense for the protection of the adjoining property from the consequences resulting from a proper and reasonable use of the way for the railroad, although such consequences would be injurious, and inevitably so, to the grantor;" that the county court is but the Commonwealth, and by reason of the grant to construct the road, they—the county and the Commonwealth—must be held to have consented to the consequences resulting from the proper use of the right of way; and further, that the authority to seize and occupy the county road longitudinally was intended to be given by the charter, providing that other branches might be built, and therefore, as the right to do this embraces the right to destroy, no damages are recoverable for such destruction.

We can not concur in these views. Upon the maxim invoked by the appellant—*salus rei publicæ lex suprema est*—we might concede the power of the Legislature to have granted to the appellant the right to take land already appropriated to another public use, and say, as contended, that "the grant of land for one public use

Louisville & Nashville Railroad Co. v. Whitley County Court.

must yield to that of another more urgent," but, as said in the case relied on by appellant—*Inhabitants of Springfield v. Connecticut River Railroad Company*, 4 Cush., 72—"When it is the intention of the Legislature to grant a power to take land already appropriated to another public use, such intention must be shown by express words or by necessary implication;" and the court further said: "As no company or persons have authority to lay out a railroad, except so far as such power is conferred by the Legislature, the court are of opinion that by a grant of power by a legislative act to lay out a railroad between certain termini, where the precise course and direction are not prescribed, but are left to the corporation to be located between the termini, no authority is given *prima facie* to lay such railroad on and along an existing public highway longitudinally, or in other words, to take the road-bed of such highway as the track of their railroad."

The broad terms of the appellant's charter in authorizing the construction of "other branch roads," instead of enlarging the power to appropriate public lands or easements, as contended by counsel, are restrictions on the power of the company, or at least are so general as not to indicate the right of such special appropriation.

The damages complained of are such as could have been provided against by the erection of stay walls on the right of way of the appellant at the beginning of the work, the cost of which would then have been inconsiderable. The proof shows that a large section of the county is cut off from the county seat by reason of the destruction of this road, and that whatever remedy may be found with which to relieve the people of that section, the cost will be largely more than the amount of the verdict. It is not

Henderson Belt R. Co. v. Dechamp, &c.

therefore excessive when considered as the total damages recoverable for the construction complained of. The county could have done nothing to prevent the injury, and its right is undoubted to maintain an action for injury to its public roads. (Lawrence County v. Chattaroi R. Co., 81 Ky., 225.)

Judgment affirmed.

CASE 36—PETITION ORDINARY—JANUARY 6.

Henderson Belt R. Co. v. Dechamp, &c.
Same v. Schlamp.

95	219
105	613

95	219
129	128
e129	130

95	219
132	333

APPEALS FROM HENDERSON CIRCUIT COURT.

1. A CITY ORDINANCE GRANTING TO A RAILROAD COMPANY THE RIGHT TO THE USE OF THE STREETS OF THE CITY for the construction and operation of its road, and providing that the company "will pay to any property owner all damages that may be recovered by such property owner, either against said railroad company or against the city, on account of the construction, location or operation of said road, or by reason of the filling, excavating or grading prescribed herein, and said company shall indemnify and save harmless said city from any liability, direct or remote," is to be regarded as a contract binding the company to pay only such damages as were recoverable by the law then in force; the purpose of the contract being to indemnify the city and not to make the company liable for remote, contingent or speculative damages.
2. RAILROADS—INJURY TO ABUTTING PROPERTY.—For an injury to his private rights the owner of an abutting lot may recover compensation from a railroad company, notwithstanding the grant of the right of occupancy by the municipal authorities.
3. SAME—MEASURE OF DAMAGES.—In this action against a railroad company to recover damages for injury to abutting property resulting from the construction and operation of a railroad along the streets of a city, the court properly instructed the jury to find for plaintiffs if they believed from the evidence that the abutting property had been damaged by reason of the cut made by the company, or from the falling of soot and cinders upon the property, or from smoke entering the house,

Henderson Belt R. Co. v. Dechamp, &c.

or from the vibrations or concussions of the running trains, but for a diminution of the value of the property, if any, caused by or resulting from a mere dislike of residing near a railroad, or from smoke, cinders and soot as would fall on the property by reason of currents of wind, they were to allow no damage.

YEAMAN & LOCKETT AND H. F. TURNER FOR APPELLANT.

1. Every owner of property in a city holds it subject to the right of the city to improve its streets, and must submit to any loss or inconvenience occasioned thereby. (Dillon on Mun. Corp., secs. 989-991; Newport Bridge Co. v. Foote, 9 Bush, 272-3.)
2. It does not appear from the circumstances of the transaction, the object of it, or the language used, that the "damages" provided for were other than the damages recognized by law as recoverable of railroads for occupying a street in a city. Excavations made in conforming to a grade established by the city have never been held the subject of damages.
3. It was error to admit testimony of Steele that the running of trains over the railroad shook his residence, which was some distance from that of appellees. (L. & N. R. Co. v. Reutlinger, 9 Ky. Law Rep., 814.)

JAMES F. CLAY AND S. B. & R. D. VANCE FOR APPELLEES.

1. The ordinance and its acceptance by the railroad company constitute a contract between it and the city, and any of its provisions affecting the interests of the citizens or owners of property in the city are intended for their benefit. (Paducah Lumber Co. v. Paducah Water Supply Co., 89 Ky., 340; Duncan v. Owensboro Water Co., 12 Ky. Law Rep., 35; Joy v. St. Louis, 138 U. S., 1.)
2. The ordinance granting to the railroad the right to build and operate its road in the streets, with all its provisions, must be the law of the railroad in the street both as to its rights and privileges and as to its liabilities. (Lewis on Eminent Domain, sec. 116; 2 Dillon's Mun. Corp., sec. 705 and notes; Louisville City Ry. Co. v. Louisville, 8 Bush, 415, 420; 10 Bush, 127, 129; 9 Bush, 127; People v. Barnard, 18 N. E. Rep., 354.)
3. The ordinance was intended to enlarge the right to compensation; otherwise it is meaningless. (Lewis on Eminent Domain, secs. 112, 221, 232, 233, 235, 207-217; Parker v. Boston & Maine R. Co., 8 Bush, 107; Rigney v. Chicago, 102 Ill., 64; Chicago & Western End R. Co. v. Ayers, 14 Am. and Eng. Ry. Cases, 152; Chicago v. Taylor, 125 U. S., 161; Bradey v. New York, &c., R. Co., 21 Conn., 294; Grafton v. B. & O. R. Co., 21 Fed. Rep., 309; Pennsylvania R. Co. v. Miller, 132 U. S., 75; Henderson Bridge Co. v. City of Henderson, 12 Ky. Law Rep., 415.)

Henderson Belt R. Co. v. Dechamp, &c.

It was certainly intended that the abutting property owner should be allowed at least such resulting damage as this court has allowed to the remainder of one's tract of land through which a strip has been taken for the right of way of a railroad. (*Asher v. L. & N. R. Co.*, 87 Ky., 391.)

4. The rules for the construction of ordinances are the same as for statutes. (*Hopkins v. Mayor of Swansea*, 4 M. and W., 621; *Gas Company v. City of Des Moines*, 44 Iowa, 505.)

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

The city of Henderson by an ordinance of its common council submitted a proposition to the appellant, the Henderson Belt Railroad Company, embracing the terms and conditions upon which the company might construct and operate its railway on certain streets of the city.

The company accepted the conditions and constructed its road.

The track was to be constructed on a grade fixed by the council, the ties were not to be elevated above the surface of the street, and the whole was to be so maintained and operated as not to obstruct travel. Many matters of detail regulating the manner of making the fills and cuts and providing for easy crossings, etc., are set forth in the ordinance, all looking to the protection and safety of the public. The meaning of section 3 of this ordinance or proposition is the subject of inquiry on these appeals, and this section is as follows:

"Said company shall pay to any person or property owner any and all damages such person or property owner may sustain by reason of the construction, location or operation of said track or railroad, or by reason of the filling, grading or excavating of the work as prescribed or required herein. And said company will pay to any person or property owner any and all damages that may be recovered by such person or property owner,

Henderson Belt R. Co. v. Dechamp, &c.

either against said railroad company or against the City of Henderson, on account of the construction, location or operation of said road or track or by reason of the filling, excavating or grading prescribed or required herein, and said company shall indemnify and save harmless said city from any liability, direct or remote, it may incur by granting the right of way as herein specified, or by the construction or operation of said track. Engines or trains of cars shall not stand or remain on any of the tracks in any of the streets or alleys, except Towles street," etc., etc.

The appellees, Dechamp, &c., own and occupy as a residence a lot of ground fronting on Elm street and aligning on Audubon street for some one hundred and sixty-five feet: along the latter street the appellant's road runs.

The appellee, Schlamp, owns a lot of ground on Alvasia and Vine streets and on Vine and Alves streets, the road running along Vine.

It is the contention of the counsel for the appellees, that the elements going to make up the damages ordinarily recoverable from railroads by reason of their lawful occupation and use of a street are enlarged in the present instance by virtue of the provisions of section 3 of the ordinance. And that, in addition to a recovery for proximate and direct damages, the ordinance or contract under which the company entered upon the street authorizes the recovery of *all* damages, and hence includes incidental and remote injuries. It is contended that the instructions to the jury authorized a recovery for injuries excluded by the general rules of law applicable to such cases. If so, the judgment should be reversed.

It seems to us clear that the purpose of the council

was to indemnify the city against all claims for damages arising out of the construction of the work—to save it harmless from every liability, without regard to the nature or origin of it. The point in view was safety to the city, and not the varied and differing causes of action that might accrue to individuals. These were wisely left to the control of general laws.

The contention of counsel would involve the opening up of entirely new sources of litigation, establish new causes of action, and authorize a recovery for merely speculative and remote damages. This phase of the case was carefully considered by the Superior Court, and the learned judge delivering the opinion aptly said: "Conceding to the person or property owner who is injured by the construction and operation of the road the right to rely upon the contract, when the whole contract and the parties to it are considered, its purpose and meaning is plain. The city council was exercising a power granted to it—a power which should always be exercised with caution and never abused. The grading of the street for the road-bed was to be made in accordance with the council's direction, and the evident purpose was to secure the city against damages occurring to individuals by any improper exercise of its power. The members of the council were the guardians of the city—the interests of the city and its people were, in a great measure, in their keeping. And we concede to them the right and recognize it as their duty, in granting such privileges as are granted here, to guard the interest of the citizen. But certainly it was no part of their duty to alter the established rules of law, and we can not assume that it was their intention to create rights in citizens and property owners, and increase the

liability of the company to which they were granting a right, beyond that which the law imposed."

We concur in this construction. Nevertheless, the railroad company, neither with the consent nor the acquiescence of the council, nor in pursuance even of its direction, could so construct its road-bed or fix its grade as to destroy the property of the citizen or materially affect its value. Such damages as were the direct and proximate result of the excavations complained of, and of the falling soot and cinders upon the property, are recoverable upon well recognized principles, and do not depend upon contract. In the first-named case the jury were told to find for the appellees if they believed from the evidence that the abutting property had been damaged by reason of the cut made by the company, or from the falling of soot and cinders upon the property, or from smoke entering the house, or from the vibrations or concussions of the running trains, but for a diminution of the value of the property, if any, caused by or resulting from a mere dislike of residing near a railroad, or from smoke, cinders and soot as would fall on the property by reason of currents of wind, they were to allow no damage. If the smoke or cinders would not fall on the property except by the force of the wind, the jury were told that such damage was necessarily unavoidable in the operation of railroads, and for which the law allows no recovery.

In the second-named case the jury were told to find for the appellee, Schlamp, if his property had been rendered permanently less valuable by reason of being less accessible because of the fills and excavations made in front on the streets, and that for a diminution in value, if any,

caused by a mere dislike of residing near a railroad, they were to allow no damages.

The damage recoverable under these instructions was the direct and proximate result of the appellant's wrongdoing, and the act was not rendered less hurtful to the appellees if authorized by the council. The municipal authorities could not transfer rights which the municipality did not possess, and the easement of access and immunity from falling soot and smoke directly from the engines of the company, were private rights entirely distinct from those of the public, and did not pass under the grant of the council, and for an injury to his private rights the owner of an abutting lot may recover compensation from a railroad company, notwithstanding the grant of the right of occupancy by the municipal authorities. (Elliott on Roads and Streets, 532; Elizabethtown, &c., R. Co. v. Combs, 10 Bush, 382.)

The instructions are substantially correct and the proof of the damages explicit. The judgments are affirmed.

Kirksey v. Turner.

CASE 37—PETITION ORDINARY—JANUARY 11.

Kirksey v. Turner.

APPEAL FROM M'CRACKEN COURT OF COMMON PLEAS.

1. **VALIDITY OF LAND PATENTS.**—Entries, surveys and patents are not void merely because they contravene some statutory regulation, unless the statute declares that they are void if issued in contravention of its provisions, or that they shall be deemed fraudulent if made and issued under certain circumstances.
2. **SAME.**—A patent issued in contravention of a statute which contains no such declaration, being valid upon its face, can not be attacked in a collateral proceeding and disregarded by showing some latent defect, such as would authorize a court to declare it invalid, and set it aside in a direct proceeding for that purpose.
3. **SAME.**—The Virginia act of 1781, setting apart the land west of the Tennessee River for military purposes, did not annul any prior vested right, and an entry made prior to the passage of the act vested an inchoate legal right which was perfected by a patent issued in conformity therewith, although subsequent to the passage of the act. And this is true as to an entry made during the session of the Legislature at which the act was passed, as the act can not by construction relate back to the first day of the session so as to antedate entries which were in fact made prior to its passage.
4. **SAME.**—Even conceding that such entries were void, a patent to such land issued by the State of Kentucky in 1806 was valid, for the reason that, no title to the land having been vested in any individual under the Virginia act, the State of Kentucky had the right to authorize the appropriation of it to other uses, which she did by the act of 1795, and the patent issued in 1806 was an actual appropriation of it pursuant to that act.

W. G. BULLITT FOR APPELLANT.

1. The rights of each party being derived from entries made by authority of Virginia, the laws of Virginia must control. (Compact with Virginia; *Read v. Smith*, 6 Mon., 455-499.)
2. When a patent bears two dates, the later must be taken as the true date. (*McGowan v. Crooks*, 5 Dana, 67.)
A fortiori, where the entry bears two dates, the later must be taken as the true date.
3. Until 1785 all legislative acts took effect on the first day of the session at which they passed, both in Virginia and England. (*Littell's*

Kirksey v. Turner.

Laws, vol. 1, p. 385; Kent's Comm., vol. 1, pp. 456, 457, 458; Rollins, &c., v. Clark, 8 Dana, 15.)

The act appropriating land west of the Tennessee River having passed at the November session, 1781, which met on the 5th of said month (Henning's Va. Stats., vol. 10, p. 439), and December 3d being the earliest day appellees can claim Mayo's entry to have been made, the land west of the Tennessee River was not vacant and unappropriated at the time of Mayo's pretended entry, and said entry was therefore void.

4. The act of 1781 appropriating land west of the Tennessee River was not retroactive. (Caveat case, Hughes' Rep., 77; Rollins, &c., v. Clark, 8 Dana, 15.)
5. When there are no conflicting valid interests in the way, the Legislature may validate an invalid entry. But wherever such validating attempts are in conflict with any valid vested rights, it can not be done.

Clark had a vested right which was not affected by the act of 1794 (1 Littell's Laws, p. 285), and all that is said in Rollins, &c., v. Clark, 8 Dana, 15, that is in conflict with this view, is mere *dictum*, and not binding.

L. D. HUSBANDS AND OSCAR TURNER FOR APPELLEE.

1. The old fiction of British law that an act of Parliament is reckoned as taking effect from the first day of its session long ago ceased to exist, and this court can never follow such an exploded English rule, especially when to do so would divest vested rights.
2. A patent can be impeached only in a direct proceeding, unless the Legislature has declared that the patent shall be *void* or deemed *fraudulent* if issued in contravention of a described state of case. (Taylor v. Fletcher, 7 B. M., 82.)
3. Whether Clark's entry was void or not, the act of 1794 not only authorized, but made it the imperative duty of, the Register to issue a patent on the certificate of survey, as he seems to have done in obedience to that act; and a patent thus issued, pursuant to mandate of law, can not be deemed void merely because the entry was invalid.

CHIEF JUSTICE BENNETT DELIVERED THE OPINION OF THE COURT.

On November 20 and December 3, 1781, Mayo made two entries under the Treasury Warrant Law of Virginia, embracing 17,000 acres of land lying on Clark's River and west of the Tennessee River, in this State. In 1784 these entries were surveyed, and in 1806 a patent was issued by this State for said land. The appellee, many years ago,

Kirksey v. Turner.

purchased a part of this land, and it is admitted that he is the owner thereof as far as the patent and deed to him confers title and right to possession.

The appellant was sued by the appellee for trespassing upon said land by cutting and taking timber therefrom. To this action the appellant made defense that the appellee was not the owner of the land; that Clark, by entry April 1, 1785, under the Virginia Land Warrant Law, and survey in 1825, and patent from this State in 1826, obtained title to this land, and as the Mayo entry, survey and patent were void, Clark's entry, survey and patent is the paramount and only title to the land, which the appellant relies upon as a bar to the appellee's right of action.

There is no evidence connecting the appellant with Clark's title, if he has title. He stands before this court as a trespasser upon land that does not belong to him and to which he has not even color of right, and his only hope of protection is to show that the entry, survey and patent of Mayo is void and confers upon the appellee no proper title whatever upon which to rely; and, as he had no actual possession of the land at the time of the trespass, he had no right of action whatever.

The appellant relies on an act of the Virginia Legislature (passed subsequent to the two entries mentioned) setting apart the land west of the Tennessee River for military purposes, etc. It is claimed that by the law then in force in Virginia an act passed at any time during the term of the Legislature related back and took effect on the first day of its term; and as the first day of its term was prior to the Mayo entry and survey, the same was overreached and made void, and the patent that was

Kirksey v. Turner.

thereafter issued upon said entry and survey was likewise void.

Now, the act relied upon as setting this land apart for military purposes does not declare that entries, surveys and patents in contravention of it shall be void. We understand that entries, surveys and patents are not void merely because they contravene some statutory regulation, unless the statute declares that they are void if issued in contravention of its provisions, or that they shall be deemed fraudulent if made and issued under certain circumstances. As said, the Legislature, by said act, not having done either of these things, the entry, survey and patent are not void. Then, the question is—the patent being valid upon its face—can it be attacked in a collateral proceeding and disregarded by showing some latent defect, the same as would authorize a court to declare it invalid and set it aside in a direct proceeding for that purpose?

It is sufficient to say that this court, by uniform decision, has decided that such patents can not be attacked in a collateral proceeding; that it required a direct proceeding to attack them; that such patents as are declared void or fraudulent in the manner suggested are the only ones that can be attacked collaterally; also, there is no question raised that these entries were not valid at the time they were made, and nothing appearing to the contrary, we must presume that they were.

In the case of Rollins, &c., v. Clark, 8 Dana, 15, this court decided that such entries, when made according to law, were locations and appropriations of vacant land and vested an inchoate legal right, which was perfected by a patent issued in conformity therewith. According to

Kirksey v. Turner.

this rule we are at a loss to know how a subsequent act of the Virginia Legislature could, by construction, relate back and antedate these entries so as to destroy the inchoate legal title with which Mayo was vested by said entries and prevent him from perfecting the same by patent. It seems to us that to allow it to be done would be monstrous.

Besides all this, it is expressly held in the case *supra*, that conceding such entries as were made in this case void, the patent that issued to Mayo in 1806 by this State was not also void; because, at the date of the patent, the land was not actually entered and patented, but belonged to the State of Kentucky, and she had the power to dispose of all the land within her limits, not specifically disposed of to others, so as to invest them with title. No person, at the date of the patent, had taken up this land so as to vest an inchoate legal title in him. It belonged to the State of Kentucky, and no title to it having been vested in any individual under said Virginia act, Kentucky had the right to appropriate it to other uses, which she did by the act of 1795, authorizing the appropriation of it, and which was actually appropriated to Mayo by patent.

The rule thus announced in the case *supra*, whatever counsel may think of its correctness when rendered, should be invoked now as a bulwark to protect persons in property rights acquired nearly a hundred years ago, and which have never been questioned until now; and to overrule the one in the particular mentioned would have the effect to invalidate the paper title to all the property in the growing, beautiful and magnificent city of Paducah.

The judgment is affirmed.

CASE 38—APPEAL TO CIRCUIT COURT—JANUARY 13.

95 231
98 180

Evans v. Commonwealth.

APPEAL FROM LAWRENCE CIRCUIT COURT.

1. **APPLICATION FOR DRUGGIST'S LICENSE WITH PRIVILEGE OF SELLING LIQUOR.**—The statute which requires notice of an application to sell liquor by retail to be posted for ten days at the court house and four other places, does not apply to an application for druggist's license with privilege to sell liquors.
2. **SAME.**—As appellant, upon a motion by him before the county judge for a druggist's license with privilege to sell liquors, testified that he had sold spirituous liquors in violation of law since the present revenue law went into effect; that he could not tell the number of times that he had done so, and that during the fourteen years he had been in business he or his clerk had been indicted at nearly every court for the illegal sale of liquor, the court properly refused a license, it being easily inferable that the applicant was not a druggist in good faith, but had assumed the name or business for the purpose of retailing liquors.
3. **SAME.**—When the applicant for such a license has, within six months next preceding the application, been selling without the license, the statute makes it the duty of the judge to refuse the license, unless the applicant will, in addition to the regular license tax, pay a sum equal to 20 per cent thereof.

ALEXANDER LACKEY FOR APPELLANT.

The appellant being a druggist and having given the notice required by law, the county court had no right to refuse to grant him license to retail spirituous and vinous liquors. The fact that he had been indicted for selling liquors did not show that he had assumed the business of a druggist for the purpose of retailing liquors. (Act November 11, 1892, chap. 198, Acts 1891-2-3, pp. 387, 341, 343.)

WM. J. HENDRICK, ATTORNEY-GENERAL, AND R. T. BURNS FOR APPELLEE.

Appellant did not comply with the law in that the required number of notices was not posted, and besides, the notice was too vague and uncertain.

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

The appellant, by motion before the county judge of his county, and after posting for ten days the notice of the application required of persons who desire to sell spirituous, vinous and malt liquors by retail, sought to obtain a druggist's license with privilege to sell liquors as provided by law. His application was refused, and the only argument used by the counsel representing the appellees in the court below is, that the notice of the application was posted at only four places instead of five, as required by law. A casual examination of the statute will show that this notice posted at the court house door and at four other places for ten days is intended to apply only to retail dealers of spirituous, vinous and malt liquors, and not to druggists, as such, who may sell by the quart under certain restrictions and on the prescription of a physician, so that if this were the only reason for refusing the license the applicant's motion should have prevailed. But, on the trial of the motion, the appellant testified that he had sold spirituous liquors in violation of law since November 11, 1892—the date of the passage of the new revenue law, and that he could not tell the number of times he had done so; that he was in the store but little and his clerk attended to the business; that he had been in business fourteen years, and that at nearly every court since he began business he or his employe had been indicted for the illegal sale of liquors.

From the proof it is easily inferable that the applicant was engaged in the business of unlawfully retailing liquors, and that he was not a druggist in good faith, and had assumed the name or business for the purpose of retailing liquors. Upon such a state of case the court

Green, &c., v. Commonwealth.

properly refused the application. (Acts 1891-2-3, chapter 103, article 10, subdivision 2, section 16; The Kentucky Statutes, section 4205.)

Moreover, section 3 of the same article of chapter 103 of the Acts 1891-2-3 (section 4193 of The Kentucky Statutes) provides that no person shall be granted such a license who has been engaged in a business requiring it and has been selling without the license within six months next preceding his application for license, "who will not, in addition to the regular license tax, pay a sum equal to twenty per cent thereof." The applicant made no offer to pay this sum or penalty, and could not do so, because he had violated the law so many times he could not tell the amount due under the section named.

The judgment is affirmed.

CASE 39—PETITION ORDINARY—JANUARY 18.

Green, &c., v. Commonwealth.

APPEAL FROM BELL CIRCUIT COURT.

CLASSIFICATION OF CITIES.—Where a city has been assigned by the Legislature to a particular class, as provided by section 156 of the new Constitution, it must remain in that class until changed by the Legislature. The courts have no power to transfer it to another class upon the ground that its population was not sufficient to entitle it to a place in the class to which it was assigned.

WM. LOW FOR APPELLANTS.

The power to classify the various cities of the Commonwealth is vested in the Legislature and in no other department of the government, and the courts have no power to review the action of the Legislature. (Constitution of Ky., sec. 156; Cooley's Const. Limit. (5th ed.), p. 221, and cases cited.)

W. J. HENDRICK, ATTORNEY-GENERAL, AND UNTHANK & MONTFORT FOR APPELLEE.

As the city of Pineville was not *constitutionally* named as a city of the

Green, &c., v. Commonwealth.

fourth class, it was not *named at all*, and not being named, it was, by the act classifying cities, section 2, classified as a town of the sixth class

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

By an act of the General Assembly of the State, approved September 30, 1892, the cities of the Commonwealth were classified as required under the provisions of section 156 of the Constitution. The city of Pineville, Bell County, was classified or designated as a city of the fourth class. On June 28, 1893, the charter of cities of the fourth class was approved, and thereafter the mayor and council of the city of Pineville proceeded to enact such ordinances as were provided for in the charter for cities of this class, and otherwise to run the city government in conformity with the charter for the class indicated. Thereupon this action was brought against the mayor and councilmen, charging that the actual population of the town of Pineville, according to the census of 1890, was only 1,356, whereas the Constitution provided that to the fourth class shall belong cities and towns having a population of 3,000 or more, and less than 8,000; therefore, that the town was in fact not one of the fourth class, and the officers named were wrongfully imposing upon the citizens an extravagant and illegal form of government. A demurrer to the petition was overruled, and, the appellants declining to plead further, the court adjudged that the town of Pineville belonged to the sixth class, and that its officers—the appellants—were, without warrant of law, exercising the powers of councilmen of a fourth-class city, and that their acts in laying off the city into wards, designating voting places and providing

for the election of officers of the town as for a city of the fourth class were illegal and void.

The officers of the city have appealed, and the only question involved is whether the classification of the cities and towns of the Commonwealth shall be made by the courts, or made—as provided in the Constitution—by the General Assembly. To state the question is, of course, to answer it. The language of the Constitution is: “The General Assembly shall assign the cities and towns of the Commonwealth to the classes to which they respectively belong, and change assignments made as the population of said cities and towns may increase or decrease, and in the absence of other satisfactory information as to their population, shall be governed by the last preceding Federal census in so doing; but no city or town shall be transferred from one class to another, except in pursuance of a law previously enacted and providing therefor.” Clearly, therefore, to the legislative department of the government, in pursuance of some law enacted for that purpose, must be left the right to change the assignment of a city from one class to another, if the unambiguous direction of the Constitution is to be observed. No argument or citation of authority can make this plainer than the Constitution makes it.

The demurrer should have been sustained and the petition dismissed, and to that end the judgment is reversed.

Hackett, Adm'r, v. Louisville, &c., R. Co.

CASE 40—PETITION ORDINARY—JANUARY 20.

Hackett, Adm'r, v. Louisville, &c., R. Co.

APPEAL FROM DAVEISS CIRCUIT COURT.

1. IN AN ACTION UNDER SECTION 8 OF CHAPTER 57, GENERAL STATUTES, to recover for the killing of one person by the willful neglect of another, there can be no recovery, unless the person killed left either widow or child. And where the petition alleges "gross and willful neglect," the action will be regarded as under section 8, just as if willful neglect alone had been alleged.
2. RIGHT TO SUE FOR BOTH DEATH AND SUFFERING—ELECTION.—Where the death of one person is caused by the negligence of another and there is an interval of suffering between the time of injury and the time of death, the representatives of the decedent can not recover both for the suffering and for the death, but must elect. Therefore, where the administrator has filed his petition seeking to recover for the death, he can not file an amended petition to recover for the suffering.

OWEN & SON AND W. N. & J. J. SWEENEY FOR APPELLANT.

It is not possible to reach the conclusion that the injury would not have occurred but for the act of the plaintiff's intestate. But even though it were by her fault the timber was precipitated upon her, the appellee is liable. (Bransom's Adm'r v. Labrot, &c., 81 Ky., 639.)

Given's Adm'r v. Ky. Cent. R. Co., 12 Ky. Law Rep., 960, distinguished.

HELM & BRUCE FOR APPELLEE.

1. This was an action under section 8 of chapter 57, Gen. Stats. The coupling of the allegation of gross neglect with that of willful neglect does not change the character of the action. (Bransom's Adm'r v. Labrot, 81 Ky., 641; Cincinnati, &c., R. Co. v. Privitt's Adm'r, 92 Ky., 223.)
2. The action being for willful neglect, and brought under section 8, can not be maintained, as there are no children or widow. (Henderson v. Ky. Cent. R. Co., 86 Ky., 389; Jordan's Adm'r v. Cincinnati, &c., R. Co., 89 Ky., 40; Newport News, &c., R. Co. v. Dentzel, 91 Ky., 56.)
3. A party can not maintain upon the same state of facts two distinct causes of action, one for injuries and the other for death. (Conner's Adm'r v. Paul, 12 Bush, 147.) And therefore the plaintiffs here,

Hackett, Adm'r, v. Louisville, &c., R. Co.

having sought by their original petition to recover for the death, could not, while still adhering to the cause of action therein pleaded, attempt, by amended petition, to recover for the injuries during the life.

CHIEF JUSTICE BENNETT DELIVERED THE OPINION OF THE COURT.

The appellant brought this action under section 3, chapter 57, General Statutes, to recover damages for the death of his seven years old child, caused by the willful negligence of the appellee, consisting in piling some railroad ties on the commons in the City of Owensboro so carelessly and negligently that the ties, while the child was playing on the pile, rolled down and on the child, injuring it, and from which it died sixteen days thereafter.

It is alleged by the appellant that he is the father of the child and its only heir. Now, there is no principle better settled by this court than that no action can be maintained under section 3, chapter 57, of the General Statutes, to recover damages for causing death to a person by willful neglect, except by the children or widow of the deceased, or by the administrator of the deceased for their benefit, and if there be neither children nor widow, no recovery can be had for such killing. (See *Henderson's Adm'r v. Ky. Central R. Co.*, 86 Ky., 389; *Jordan's Adm'r v. Cincinnati, &c., R. Co.*, 89 Ky., 40, and *Newport News, &c., Co. v. Dentzel's Adm'r*, 91 Ky., 46.)

It appears that the appellant, as father, is the only heir of the child, and he sues as administrator of the child, which is, in effect, suing as administrator for himself as heir; but, according to the rule established by the cases *supra*, the appellant is not one of the heirs that is entitled to recover under the statute, the children and widow of the deceased being the only persons that are entitled to recover; and as the administrator can only

Hackett, Adm'r, v. Louisville, &c., R. Co.

maintain an action in their behalf, it follows the petition set up no cause of action. The expression in the petition is "gross and willful neglect." The expression "gross" signifies a less degree of neglect than the expression "willful" neglect.

But coupled, as the expressions are, they signify that degree of neglect that brings the case within the third section of the statute *supra*. The expression "gross," coupled as said with the expression "willful," so far as determining the character of the action is concerned, is immaterial and unnecessary, and does not tend to change the degree of neglect required to bring the case within section 3, chapter 57. (See Bransom's Adm'r v. Labrot, 81 Ky., 641.) Now, the amended petition, filed on the 25th day of September, 1889, alleges that the appellee, by its gross negligence, caused the injury complained of, and that the child suffered therefrom for fifteen days. The appellant then prays as in his petition. The amendment does not retract the allegations of the petition as to willful neglect, but, at most, it only adds another count for gross neglect, so as to have two counts, one for the suffering caused by gross neglect, the other for the killing caused by willful neglect.

Now, this court has decided and settled the question that where certain acts cause death, they can not be divided so as to make two actions, one to recover for the suffering caused, and the other to recover for death. The party must elect. (See Conner's Adm'x v. Paul, 12 Bush, 147.) Here, as said, the amendment and the petition make two counts, which are in effect two causes of action, when the facts causing the death constitute but one cause of action, and as they can not be divided so as

Beard, &c., v. City of Hopkinsville, &c.

to make two actions, neither can two counts, which are in effect two causes of action, be maintained on them.

The judgment is affirmed.

*CASE 41—PETITION EQUITY—JANUARY 23.

Beard, &c., v. City of Hopkinsville, &c.

APPEAL FROM CHRISTIAN CIRCUIT COURT.

1. CONSTITUTIONAL LAW—LIMITATION UPON INDEBTEDNESS OF TOWNS AND CITIES.—Section 158 of the new Constitution, limiting the indebtedness of towns and cities, became operative immediately upon the adoption of the Constitution, the maximum limit of the indebtedness of a particular town or city being determined by the class to which cities of its population were required by the Constitution to be assigned, although the classification had not then been made by the General Assembly.
2. SAME.—The prohibition of that section is against incurring a legal liability to pay in any manner or for any purpose, when a given amount of indebtedness has previously been incurred, and therefore a debt payable upon the happening of some event, such as the rendering of service or the delivery of property, is within the prohibition. And it can make no difference whether the debt be for necessary current expenses or for something else. Nor does the fact that the liability is within the limits of the revenue accruing to meet it prevent the prohibition from applying.

At the time of the adoption of the present Constitution the City of Hopkinsville, which had a population of more than three thousand and less than eight thousand, and therefore belonged in the fourth class, had an indebtedness in excess of the limit provided for cities of that class. Thereafter, but before the classification of the towns and cities by the Legislature, the city made a contract for the construction and maintenance of a system of water-works and of an electric light plant, by the terms of which the city was to pay for the use of a certain number of hydrants and a certain number of arc lights for five years the sum of \$5,500 per year as rent, and at the expiration of five years the contract for water rental was to continue fifteen years longer at \$4,500 per year, the city having an option to renew the contract for

* A note as to what constitutes an "indebtedness" within the meaning of constitutional and statutory restrictions of indebtedness of municipal corporations, is published with this case in 23 L. R. A., 402.

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99	306
99	513
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111	177
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4118	686
114	158
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Beard, &c., v. City of Hopkinsville, &c.

lights at \$1,000 per year. The annual rentals were to be met out of the annual revenues without exceeding the tax rate of seventy-five cents. *Held*—That by the contract the city incurred an “indebtedness” within the prohibition of section 158 of the Constitution, and therefore the contract is void.

J. I. LANDES, PETREE & DOWNER, C. H. BUSH, JOE MCCARROL, E. P. CAMPBELL AND J. T. HANBERRY FOR APPELLANTS.

1. The limitation in the charter of the City of Hopkinsville on the power of the city and its authorities to create indebtedness was unrepealed and in full force at the date of the contract in question here. (Acts 1869-70, vol. 2, pp. 96, 106; Acts 1879, vol. 2, p. 970.)
2. Section 157 of the new Constitution was self-executing and in force at the date of the contract. (New Const., sec. 166; Cooley's Const. Limit., 6th ed., p. 99; *Law v. People*, 87 Ill., 385; *City of Springfield v. Edwards*, 84 Ill., 626; *St. Louis v. People*, 124 Ill., 655; *Bass v. Nashville*, Meigs, 421; *Kine v. Defenbaugh*, 64 Ill., 291; *Mitchell v. Illinois, &c., Co.*, 68 Ill., 286; *Willis v. Mahon*, 48 Minn., 140; *People ex rel McRoberts*, 62 Ill., 38, 41; *Johnson v. Parkersburg*, 16 W. Va., 402.)
3. Under the contract for water and electric lights between John P. Martin and the City of Hopkinsville, the aggregate amount (\$95,000) which the city agreed to pay for the period of twenty years for water and light, although it is to be paid in fixed annual or quarter-annual sums, is a debt for the aggregate sum, from the date of the contract, of the character that is prohibited and declared void by the charter of March 5, 1870, and section 157 of the new Constitution. (*Niles' Water-works v. Niles*, 59 Mich., 311; *Coulson v. City of Portland*, Deady's Rep., 481; 91 Pa., 398; *French v. City of Burlington*, 42 Iowa, 614; *Burlington Water Co. v. Woodward*, 49 Iowa, 58; *Springfield v. Edwards*, 84 Ill., 626; *Fuller v. Chicago*, 89 Ill., 262; *Prince v. Quincy*, 105 Ill., 138; *People v. May*, 9 Col., 80; *Davenport v. Kleinschmidt*, 6 Mont., 502; s. c., 16 Am. and Eng. Corp. Cases, 301; *Culbertson v. Fulton*, 127 Ill., 80.)
4. The contract with John P. Martin is void so far as it undertakes that the City of Hopkinsville shall pay for water and light an amount in excess of the price specified in the contract equal to the city taxes and assessments on the plant from year to year, because that would in effect be exempting the plant from taxes in direct opposition to section 8 of Bill of Rights.

WOOD & BELL AND JAMES BREATHITT FOR APPELLEES.

1. Under the charter existing at the time of the adoption of the Constitution, the city had power to make the contract in question here. (Acts 1869-70, vol. 2, p. 96; Acts 1884, vol. 1, p. 895.)
2. This charter was in no way affected by the adoption of the Constitu-

Beard, &c., v. City of Hopkinsville, &c.

tion, but remained as it was until the Legislature should, by appropriate action, pass a general law for the government of cities of the fourth class. (New Const., secs. 156, 157, 158, 166, 167; *Holzhauser v. City of Newport*, 94 Ky.)

3. The provisions of our Constitution should be given the same construction given by the States from which they are borrowed. (*Cooley's Const. Limit.*, 15th ed., sec. 64; *Fall v. Hazlerigg*, 45 Ind., 576; s. c., 15 Am. Rep., 278; *Langdon v. Applegate*, 5 Ind., 823; *Clark v. Jeffersonville R. Co.*, 44 Ind., 248; s. c., 21 Am. Dec., 887; 35 Am. Dec., 228.)
4. The current revenues of the city were ample to meet the quarterly payments and other expenses, and therefore no debt within the constitutional inhibition was created. (*Grant v. City of Davenport*, 36 Iowa, 396; *Dively v. City of Cedar Falls*, 27 Iowa, 227; *City of Valparaiso v. Gardner*, 97 Ind., 1; s. c., 49 Am. Rep., 417; *Quill v. City of Indianapolis*, 7 Lawyers' Rep. Ann., 681; *Crowder v. Town of Sullivan*, 13 Lawyers' Rep. Ann., 647; *East St. Louis v. East St. Louis G. L., C. & C. Co.*, 98 Ill., 415.)

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

On June 13, 1892, the appellee, through its Board of Councilmen, entered into a contract with its co-appellee, John P. Martin, by the terms of which the latter agreed to construct and maintain, in and near the city, a system of water-works and sewerage and also an electric light plant. For the use of seventy hydrants for five years and of thirty-five arc lights for the same period, the city agreed to pay Martin as rent the sum of \$5,500 per year. At the expiration of the five years the contract for water rental was to continue fifteen years longer at \$4,500 per year, the city having an option to renew the contract for lights at \$1,000 per annum.

The city contained a population of more than three thousand and less than eight thousand, and therefore would be a city of the fourth class whenever the assignment and classification should be made of the cities and towns of the State as required by the Constitution. This assignment or classification had not been made at the

Beard, &c., v. City of Hopkinsville, &c.

date of the contract or institution of this action. The indebtedness of the city was something like \$125,000, due mainly in five-thirty bonds, to the Ohio Valley Railway Company. The value of the taxable property for 1891 was \$1,546,380. It is shown that, with a tax rate of seventy-five cents on the hundred dollars, together with the usual collections from other fixed sources, the city could pay its annual current expenses of all kinds, and also the additional water and light rental proposed in the contract, and still have an annual surplus of several thousand dollars.

Immediately after this contract was made, the appellants, who are citizens and taxpayers of the city, instituted this action to have the contract declared void, contending that the City of Hopkinsville—or its Board of Councilmen—had no constitutional power to make the contract, because it bound the city to pay an indebtedness shown to be in excess of the limitations imposed on the city and its authorities by the Constitution. There were other contentions which are not necessary to notice.

The chancellor determined all the points made against the plaintiffs below, upheld the contract and dismissed the petition. This appeal involves the correctness of that judgment.

The constitutional provision supposed to affect the question involved is as follows:

“Sec. 158. The respective cities, towns, counties, taxing districts and municipalities shall not be authorized or permitted to incur indebtedness to an amount, including existing indebtedness, in the aggregate exceeding the following named maximum percentages on the value of the taxable property therein, to be estimated by the

assessment next before the last assessment previous to the incurring of the indebtedness, viz.: . . . cities and towns of the fourth class, five per centum: . . . *Provided*, Any city, town, etc., may contract an indebtedness in excess of such limitations when the same has been authorized under laws in force prior to the adoption of this Constitution, or when necessary for the completion of and payment for a public improvement undertaken and not completed and paid for at the time of the adoption of this Constitution. . . .

"Sec. 166. All acts of incorporation of cities and towns heretofore granted, and all amendments thereto, except as provided in section one hundred and sixty-seven, shall continue in force under this Constitution, and all city and police courts established in any city or town shall remain, with their present powers and jurisdictions, until such time as the General Assembly shall provide by general laws for the government of towns and cities and the officers and courts thereof, but not longer than four years from and after the first day of January, one thousand eight hundred and ninety-one, within which time the General Assembly shall provide by general laws for the government of towns and cities, and the officers and courts thereof, as provided in this Constitution."

By their contention, the appellants mean that the indebtedness of the city, at the time of the contract, was in excess of five per centum on its taxable property, which is the limit prescribed by the 158th section of the Constitution for cities of the fourth class, and Hopkinsville is alleged to be a city of the fourth class by reason of its population being three thousand or more and less than eight thousand.

Beard, &c., v. City of Hopkinsville, &c.

In order to apply this limit of five per centum counsel for the appellants plead, as a fact, that the population of the city was such as required its assignment and classification among cities of the fourth class. It is not contended, as we understand the argument, that the actual assignment—the mere form of classification—directed by the Constitution to be made by the General Assembly, can be made by the courts, but that it was the evident intention of the framers of the Constitution to have the wholesome limitations provided for in the section to apply instantly upon its adoption; that the assignment or classification was a mere form, and its delay should not entitle the cities desiring to do so, to overreach the plain provisions of the Constitution and deliberately incur an unauthorized indebtedness.

Notwithstanding the fact that some difficulty may seemingly arise in ascertaining what maximum percentage on the value of the taxable property in a given city is to be applied in determining what limitation on the indebtedness shall control in the absence of the classification, yet we are constrained to the conclusion that not to apply the section as one affecting and controlling the cities of the Commonwealth immediately upon the adoption of the Constitution, would be in clear defiance of the determined will of the body framing the instrument.

No one idea stands out more clearly than that barriers should be erected against the creation of municipal indebtedness. In times of popular excitement, the internal improvement craze had well nigh wrecked many of the most flourishing counties and towns of the hitherto staid and conservative Commonwealth. To seek excuses

for withholding the application of these conservative restraints, thus wisely devised by this body of enlightened men, and delay the beneficent results intended, merely because a formal assignment of a given city had not been made to its appropriate class, would be giving prominence to the shadow and losing sight of the substance. Moreover, it will be observed, that the percentages are not fixed wholly with reference to the classes to which the cities may belong, but the per centum fixed for some of the cities is made to depend on their population, and recourse must therefore be had, in such cases, to the ordinary methods of proof to ascertain the *per centum* applicable.

In discussing a similar question, it was said in *Law v. The People*, 87 Ill., 385: "It has been repeatedly held, and is regarded as settled doctrine, that all negative or prohibitive clauses of this character found in a Constitution execute themselves; as legislative provisions in the same or other language, prohibiting the incurring of such indebtedness, could be no more binding or forcible than the Constitution itself."

In the case of *Holzhauser v. City of Newport*, 94 Ky., 396, it was contended that because the indebtedness of the city at the time of the adoption of the present Constitution, and at the time the contracts in question were entered into, was in excess of ten per centum on the valuation of her taxable property during that time, therefore the prohibitory provisions of section 158 were applicable. And we said of this contention: "It may be admitted that to the extent that this section provides for a state of case in existence at the time of the adoption of the Constitution, it is applicable to all towns and cities

Beard, &c., v. City of Hopkinsville, &c.

resting under the conditions named; but, in express terms, the limitation of ten per centum may be exceeded when the proposed indebtedness 'has been authorized under laws in force prior to the adoption of this Constitution.'"

This section was therefore treated as in full force upon the adoption of the Constitution, and as applicable to the cities and towns resting under the conditions named. The contract for the increased indebtedness of the city (Newport) was upheld upon the ground that it was contracted "under laws in force prior to the adoption of the Constitution"; those laws being in the form of amendments to the charter of the city, approved in 1890, authorizing the issual of bonds for specific purposes, to be paid by taxes levied within certain specified districts created by the acts in question. These amendments to the organic law of the city were held to be continued in force, in express terms, under the provisions of section 166 of the Constitution.

Construing the section (158) as operative immediately upon the adoption of the Constitution, the question, is, does the contract under consideration "authorize an indebtedness," on the part of the City of Hopkinsville, "to an amount, including existing indebtedness, in the aggregate, exceeding" five per centum on the taxable property of the city? The question is wholly new to the law of our State; but the Constitutions of a number of the other States contain provisions similar to the one under consideration, and the answers given by the various courts to the question indicated are by no means harmonious.

It is to be remembered that the annual rentals are to

be met out of the annual revenues without any increase of the tax rate of seventy-five cents on the one hundred dollars of taxable property, and that as the contractor, Martin, furnishes the water and light, and thus earns the money he is paid therefor, the appellees, therefore, contend that the liability is thus extinguished as soon as it comes into existence. They contend that "when liabilities are created and appropriations are made which are within the limits of the revenue accruing to meet them, they are not debts within the meaning of the prohibition of the Constitution." The cases relied on by them sustain their contention that revenues may be disposed of in advance of their receipt—hypothecated as it were—as if already in the treasury, and when such an appropriation will meet and discharge the obligation, which is but a contingent one, no indebtedness is created in the meaning of the Constitution.

We suppose, however, that if the words used in the Constitution are to be given their usual and commonly accepted meaning by the contract in question, the city does "incur an indebtedness" in the sense these terms are used in the Constitution; and that this indebtedness is in excess of the limitation imposed is apparent. Turning to some of the decisions in States with constitutional provisions similar to ours, we find the Illinois Supreme Court, in *City of Springfield v. Edwards*, 84 Ill., 626, thus discussing the question:

"It is provided by section 12, article 9, of the present Constitution, that 'no county, city, township, school district or other municipal corporation shall be allowed to become indebted, in any manner or for any purpose, to an amount, including existing indebtedness, in the aggre-

Beard, &c., v. City of Hopkinsville, &c.

gate, exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment, etc.' . . . The prohibition is against becoming indebted—that is, voluntarily incurring a legal liability to pay, in any manner or for any purpose, when a given amount of indebtedness has previously been incurred. It could hardly be probable that any two individuals of average intelligence could understand this language differently. It is clear and precise, and there is no reason to believe that the convention did not intend what the words convey. A debt, payable in the future, is obviously no less a debt than if payable presently; and a debt payable upon a contingency, or upon the happening of some event, such as the rendering of service or the delivery of property, etc., is some kind of a debt, and therefore within the prohibition. 'If a contract or undertaking contemplates, in any contingency, a liability to pay when the contingency occurs, the liability is absolute—the debt exists—and it differs from a present unqualified promise to pay only in the manner by which the indebtedness was incurred. And since the purpose of the debt is expressly excluded from consideration, it can make no difference whether the debt be for necessary current expenses or for something else.'"

In *Culbertson v. City of Fulton, &c.*, 127 Ill., 30, in discussing a contract for constructing a system of waterworks to be paid for in the future, the court said: "By entering into the contract of August 15, 1887, the city 'became indebted.' The obligation entered into by the terms of the contract constituted such an indebtedness as is contemplated by the language of the Constitution. It can not be said that the indebtedness did not come into

being until the work was completed and occupied by the city. 'The city bound itself to pay for the work when it should be completed, and could be compelled to do so if the work should be done according to contract.' And the case of City of Springfield v. Edwards, *supra*, is referred to and approved. To the same effect are the cases in the same court of Law v. People, 87 Ill., 385; Prince v. City of Quincy, 105 Ill., 138.

In the case of Sackett v. City of New Albany, 88 Ind., 473, it was held that when the Constitution forbids a municipal corporation ever to become indebted beyond a certain amount, that sum may not be exceeded even for necessary expenses. The contract was for the erection of fire-alarm strikers and signal boxes at the price of \$3,325, when the limit imposed by the Constitution had already been exceeded. The language of the Constitution was similar to ours, and the court, by Chief Justice Niblack, after reviewing the decisions of the courts of Illinois and Iowa, said: "By 'indebtedness,' in this connection, we mean an agreement of some kind by the city to pay money when no suitable provision has been made for the prompt discharge of the obligation imposed by the agreement. It was obviously the intention of the Legislature in submitting, and of the people in adopting, the thirteenth article of the Constitution, to arbitrarily restrict the power of municipal corporations to contract debts to a limited per centum of the taxable property, and to require, when that limit of indebtedness has been reached, that such corporations shall be prepared to pay for whatever of value they may obtain without the incurrance of any further indebtedness for any purpose whatever."

Beard, &c., v. City of Hopkinsville, &c.

That there are cases in all these States upholding contracts similar to the one now under consideration must be admitted, and that the two classes of cases are not easily, if at all, reconcilable, is evident.

We have adopted the view in accord with the spirit of the Constitution, as we understand it, and as we think, also, in accord with better reason. Any other doctrine opens the door to all the mischiefs intended to be inhibited by the Constitution.

A fair illustration of the doctrine contended for by the appellees is given in the case of *Dively v. City of Cedar Falls*, 27 Iowa, 232, relied on by them, where it is held that "If A should undertake to build a court-house within three years, doing so much and to be paid accordingly each year, the obligation of the contract would arise when executed, but the *indebtedness* under the Constitution (if there were none other) would be measured by that to be paid each year."

It seems to us that such a construction of the Constitution would render the limitations in question wholly nugatory. It is needless to notice any other of the alleged reasons urged against upholding the contract, as the views here announced are fatal to its validity.

The judgment is reversed, with instructions to proceed according to the principles announced in this opinion.

Williamson, by, &c., v. Louisville Industrial School of Reform.

*CASE 42—PETITION ORDINARY—JANUARY 27.

Williamson, by, &c., v. Louisville Industrial School of Reform.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

AN ACTION DOES NOT LIE AGAINST THE LOUISVILLE INDUSTRIAL SCHOOL OF REFORM FOR AN ASSAULT upon an inmate by an officer or employe thereof, the institution being a charity maintained by taxation and State aid. Damages are to be paid out of the pocket of the wrongdoer, and not from the trust fund.

SAMUEL B. KIRBY AND GEORGE WEISSINGER SMITH FOR APPELLANT.

Brief withdrawn.

T. L. BURNETT FOR APPELLEE.

The defendant is an agency of the Commonwealth of Kentucky and can not be sued without the consent of the Commonwealth. (Farnham v. Pierce, 141 Mass., 208; 1 Duv., 297; 81 Ky., 212; 82 Ky., 666; 18 Bush, 226.

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

The appellee, the Louisville Industrial School of Reform, was created a body-corporate by an act of the General Assembly in 1854, under the name of the Louisville House of Refuge. Its object and business was to take charge of such youths as might be committed to it, and care for their moral and physical training and education. It was a charity, and its purpose was reformation by training its inmates to habits of industry and by instilling into their minds the principles of right living to the end that they might become useful citizens of the State, rather than fill its prisons and poorhouses.

*With this case as re-published in 23 L. R. A., 200, is a note reviewing the English and American decisions on the subject of the liability of a charitable institution for negligence.

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Williamson, by, &c., v. Louisville Industrial School of Reform.

The incorporators and their successors are under the control and oversight of the Legislature, and are mere instrumentalities of the Commonwealth. The State interposed in behalf of neglected and abandoned children within its confines in its capacity of *parens patriæ*, and assumed the guardianship of such children as were committed to the institution. It was an agency of the State, and maintained by taxation and State aid.

The appellant, a boy of ten years of age, was committed to the care, control and restraint of the institution, and his petition brought by his next friend, Thomas, alleges that without fault on his part, one of the servants and employes of the appellees, and known by it to be incompetent and unfit for such service, struck and beat the appellant in such cruel and inhuman manner that he was caused great suffering in mind and body, and was permanently injured and damaged, etc.

To this petition a general demurrer was sustained and the petition dismissed. The correctness of this judgment is the question on this appeal, and while it has been determined directly, the general principles are well established. The functions of the institution are governmental. As said in *Farnham v. Pierce*, 141 Mass., 203, "It is a provision by the Commonwealth, as *parens patriæ*, for the custody and care of neglected children, and is intended only to supply to them that parental custody which they have lost."

In *Perry v. House of Refuge*, 63 Md., 20, it was held that an action does not lie against a State House of Refuge for an assault made on an inmate by an officer thereof. It is there said: "Youths, in whom the seeds of vice have already germinated, are placed there under proper re-

Williamson, by, &c., v. Louisville Industrial School of Reform.

straint, so that the growth of crime may be arrested or eradicated in its incipency. Funds are contributed by individuals impelled by philanthropic motives, and donations are obtained from municipal and State treasuries. These are the funds of the institution, controlled by the managers, not for their own profit or benefit, but solely for the charitable purposes designated by its organic law. . . . Several of the most eminent judges in England expressed themselves with much emphasis in opposition to an allowance of damages out of a fund so held by fiduciary agents;" and the principle determined in a number of English cases that "damages are to be paid out of the pocket of the wrongdoer, and not from the trust fund," was approved.

It is contended that these cases followed the older decisions in England, and that the latter have been since overruled. Be this as it may, the principle announced seems entirely just and reasonable. If the funds of these institutions are to be diverted from their intended beneficent purposes by law suits and judgments for damages for negligent or malicious servants, their usefulness—indeed their existence—will soon be a thing of the past.

The judgment dismissing the petition is affirmed.

City of Louisville v. Johnson.

CASE 48—PETITION ORDINARY—JANUARY 27.

City of Louisville v. Johnson.

APPEAL FROM LOUISVILLE CHANCERY COURT.

1. **SUIT FOR TAXES—LIMITATION.**—Although under the act of May, 1884, amending the tax laws of the city of Louisville, the right of the city to sue for taxes does not accrue until the first day of May of the second year after the assessment, yet limitation as to such a suit begins to run from the time the taxes are distrainable, and the right of action is barred after five years from that time. The right to sue is merely an additional remedy in aid of the ordinary remedies for the collection of taxes, and the fact that the right to this remedy is postponed does not prolong the period of limitation.
2. **SAME**—The failure of the ministerial officer to enforce the remedies given him does not affect the right of the city to sue.
3. **SAME—BURDEN OF SHOWING DEFECTS IN TAX BILL.**—Under the provisions of the act, the tax bill authenticated by the signature of the assessor, or a *fac simile* thereof, is *prima facie* evidence of the liability, and places the burden on the defense of showing the defects, if any. The defendant may, however, by a plea denying that the assessor ever signed such a bill, place upon the city the burden of showing that it was signed by the assessor.

LAF. JOSEPH FOR APPELLANT.

1. Considering all the provisions of the act of 1884, the right of action accrues on the first of May, the second year after the assessment, when, for the first time, the bills are reported to the city attorney for suits to be brought on them. (Sessions Acts, 1883-84, vol. 2, p. 1260, *et seq.*; Gay v. City of Louisville, 14 Ky. Law Rep., 327; Gen. Stats., p. 891; Wood on Limitation, 336, 1st ed.; Boswell on Limitations and Adverse Possession, pp. 37-8.)
2. As the Legislature has provided that the tax bills which are stamped and authenticated by the assessor as original tax bills shall be *prima facie* evidence that all the steps required by the statute have been taken, this shifts the burden and places it upon the defendant in the tax suit. (State *ex rel* Collector of Franklin Co. v. Rau, 93 Mo., 126; s. c., 5 S. W. Rep., 697; Auditor Gen. v. Maier, 54 N. W. Rep., 640; Ecton v. City of Louisville, 14 Ky. Law Rep.; Cooley on Taxation, p. 297; State *ex rel* Stuart v. Maloney, 20 S. W. Rep., 1064.)

LANE & BURNETT FOR APPELLEES.

1. The city of Louisville has the right to collect by suit any tax owing to

City of Louisville v. Johnson.

it as soon as the tax is due. (Sec. 8 of art. 2, Act of May 12, 1884, Sess. Acts, 1883-4, vol. 2, p. 1271; sec. 7 of Act April 8, 1882, 2 Sess. Acts, 1881-2, p. 343; sec. 2 of art. 4, Act May 12, 1884, 2 Sess. Acts, 1883-4, p. 1274; *Idem*, secs. 3, 6, 7, pp. 1274, 1278; *Idem*, sec. 3 of art. 5, p. 1282.)

2. The limitation is computed from the time the cause of action accrues, let the remedy be what it may for its enforcement. It is the nature of the right sought to be enforced and not the method of procedure that furnishes the test as to whether the statute of limitation applies. The distinction between the cause of action and the remedy for its enforcement must be kept in view. (Civil Code, sec 90; *Veida v. Baker*, 88 N. Y., 160; *Slaughter v. City of Louisville*, 89 Ky., 112; *Louisville v. Cochran*, 82 Ky., 33; *Pomeroy on Remedies and Remedial Rights*, sec. 619; *Auditor v. Halbert*, 1 Ky. Law Rep., 253; *Childs v. Harrison*, 1 Litt., 151; *Johnson v. City of Louisville*, 11 Bush, 527; *Vaugh v. Burghard*, MS. Op., Oct., 1875; *Ormsby v. City of Louisville*, 79 Ky., 204; *Louisville Water Co. v. Commonwealth*, 89 Ky., 244; *L. & N. R. Co. v. Commonwealth*, 1 Bush, 261; *McCracken County v. Mercantile Trust Co.*, 84 Ky., 844.)
3. The tax bill does not become *prima facie* evidence until it is shown that it is properly authenticated, that fact being denied. (*Welsh v. Sackett*, 12 Wis., 357; *Ins. Co. v. Weide*, 11 Wall, 441; *King v. Burdett*, 4 B. & A., 161; *Suediker v. Everingham*, 3 Dutcher (N. J.), 153; *Pennington v. Yell*, 6 English (Ark.), 235; *Richmond v. Aikers*, 25 Vt., 326; *Tasmer v. Hughes*, 53 Pa. St., 289; *McAteer v. McMurray*, 58 Pa., 126; *Morris v. Indianapolis, &c., R. Co.*, 10 Ill. App., 395; *Johnson v. Ferrell*, 8 Ky. Law Rep., 218; *Babbitt v. Woolley*, 8 Bush, 703; *Stephens v. Guthrie*, 4 Bush, 462; *Dumesnil v. City of Louisville*, 2 Ky. Law Rep., 481; *Kendall v. Thomasson*, 2 Ky. Law Rep., 422; *Covington v. The People*, 4 Ky. Law Rep., 258; *McDonald v. Covington*, 5 Ky. Law Rep., 615; *Daubee v. City of Louisville*, 5 Ky. Law Rep., 865; *Reamer v. City of Louisville*, 6 Ky. Law Rep., 748; *Shanks v. Stevens*, 6 Ky. Law Rep., 525; *Newport v. Newport*, 7 Ky. Law Rep., 165.)

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

The assessment of the appellee's property was made, as provided by the charter of the city, as of the 1st of September, 1884, for the taxes for the year 1885. The levy ordinance was passed also, as required by the charter, in the month of December, 1884, for the taxes of the succeeding year, 1885. The charter also allows a discount

City of Louisville v. Johnson.

on the taxes if paid in the months of January, February, and March, and all taxes not paid by the 1st of May become a debt. If the taxes due are not paid by the 20th of August of the year they are due, summary process will be used or taken against the delinquent by distraint or garnishment, to be levied on the goods and chattels of the delinquent taxpayer.

Section 7 of the charter relating to this subject provides "that on the 1st of May of the second year after the assessment of city taxes, the receiver shall make out a list of the bills, still wholly or partially unpaid, on lands or improvements, and furnish the list to the city attorney, whose duty it shall be to bring, without delay, suits for the recovery thereof in the Louisville Chancery Court," etc. The act further authorizes a personal judgment.

It seems that the city, through its receiver, failed to collect the taxes due by the appellee in the ordinary mode, and having reported the appellee as delinquent, the attorney for the city filed this petition on the 16th of March, 1891, to subject the real estate of the defendant, and for personal judgment.

The statute of five years was interposed as a bar to the recovery. The taxes were due on the 1st of May, 1885, and could have been collected under a warrant by the receiver under which the goods and chattels of the taxpayer, if he had any, were liable to seizure and sale. The section of the act making the tax a debt provides that it may be enforced by all the remedies known to the law, as in cases of contract, in any court of the Commonwealth, otherwise competent for that purpose, "aside . . . from the other remedies hereinafter given." The proceeding by action in equity is given in addition to the

City of Louisville v. Johnson.

ministerial remedies provided by law, and where one fails the other remedy may be looked to.

It is argued by counsel for the appellee that at any time after the tax becomes due, the action in equity to enforce the lien may be resorted to. In this we do not concur. It could not have been intended by the framers of this statute that the doors of the courts should be thrown open and courts of equity made tax collectors in lieu of the regular ministerial or executive officers, and it is only when the remedies given the collector fail that a court of equity can be resorted to, and the statute should be followed in this regard. Nor can the failure of the ministerial officer to enforce the remedies given him affect the right of the city to sue, for after the expiration of the time given him to coerce payment, a failure on his part to collect will authorize the maintenance of the action in equity.

Counsel for the city has attempted to classify the property of the taxpayer in order to maintain his position, the result of which is to give the owner of real estate a longer time in which to pay his taxes than the owner of personal estate. The taxes on real and personal estate are due at the same time, and if limitation applies to the personalty, it also applies to the realty. The fact that an additional remedy is given the city in the event the taxpayer fails to pay the taxes on his realty does not prolong the statute. Near six years had elapsed after the tax of 1885 was due, and the city had four years in which to adopt this additional remedy. This is ample time in which to begin an action, and the tardiness of tax officials in the performance of their duties often involves innocent purchasers in litigation. And while it can not affect

the present appellee, it is a precedent that ought not to be established—that of making the time for the collection of tax on real estate greater than for its collection on personalty. The right of action exists when the summary process is allowed to go; and to have a limitation as to the collection of tax on one species of property different from that on another and distinct species, was never contemplated by the statute.

While the construction of these tax provisions is not free from difficulty, the law is made to harmonize by making the statute run from the time the tax can be coerced; and this rule should be applied to both real and personal estate.

The action in equity is at best an exceptional remedy, and was enacted to enable the city to reach the taxpayer in a particular way, when the original mode of collecting by summary proceedings failed. It is analogous to a proceeding where an execution from an inferior court can not reach the real estate of the debtor, but execution may issue, upon proper steps being taken, from a clerk's office of a court having jurisdiction, and may be then levied on the realty; or to an action in equity to enforce a judgment upon a return of *no property*. The legal remedy having been exhausted, the aid of a court of equity is given. In neither of the cases cited will it be insisted that the latter remedy, in aid of the first, prevents the running of the statute.

This charter authorizes the receiver, where there is no personalty, to garnishee the tenant if he is owing rents for the realty, and where the receiver fails to collect, a court of equity is invoked to aid in coercing the money from the taxpayer. Such proceedings are only in aid of the

original and familiar remedies for the collection of taxes, and the statute begins to run when the receiver is authorized to enforce the demand. Counsel for the city has confounded the cause of action, or rather the duty to be performed, with the remedy to enforce it in his endeavor to avoid the operation of the statute. A cause of action, says Mr. Pomeroy, accrues when there is a right in the plaintiff and a duty on the defendant responsive to the right . . . or a failure by the defendant to perform that duty without any regard as to whether the subject matter relates to person, character, property, or contract. (Section 519, Pomeroy on Rights and Remedies.)

The right to collect these taxes by distraint existed in August, 1885, and there is a plain difference between the right to be enforced and the remedies for enforcing the right. If there had been no provision authorizing a suit in equity, there could have been no question but what the statute of limitations would bar the recovery, and for the reason that the right to demand the taxes existed, and upon the refusal to pay, coercive measures by warrant were authorized, and the fact the Legislature saw proper to give other and more effective remedies, did not stop the running of the statute; in fact, the section under which the appellant brought this suit authorizes a personal judgment, showing plainly the framers of the act were providing a remedy and not an original right to demand and collect the taxes. It is true that property may be subjected that could not be levied on by a distress warrant to satisfy the demand, but this being in aid of the original remedy for enforcing the right leaves it, so far as the statute of limitations is concerned, as if no such remedy had been provided. This construction of the charter

harmonizes its provisions by making the statute run from the time summary process could issue, and not from the time suit is brought, or the receiver exhausted his powers with the remedies afforded him.

Another question has been suggested that arises from an amendment of section 8 of article 2 in relation to the tax bill. It provides: "Each bill shall be authenticated by the assessor by his signature or a stamp *fac simile* thereof, and when so authenticated, it shall be *prima facie* proof that all steps have been taken to make it a binding tax bill, for the amounts and purposes, and against the property therein named," etc.

We perceive no reason why such a tax bill may not be *prima facie* evidence of the liability, and place the burden on the defense of showing its defects, if any. It is true the burden of showing that it was signed by the assessor might be placed upon the city by a plea denying that he ever signed such a bill, but admitting its genuineness, other defects showing it to be invalid must come from the defense. (Cooley on Taxation, 297.)

We must affirm the judgment below.

In this case on a petition for a modification of the opinion explanatory of its meaning, it is plain the statute begins to run on the 20th of August of each year; then for the first time coercive measures may be resorted to.

CASE 44—PETITION EQUITY—JANUARY 27.

Bullock, &c., v. Grinstead & Co.

APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY DIVISION.

1. **LEASE WITH OPTION TO RENEW—TIME OF ESSENCE OF CONTRACT.**
—Where husband and wife executed a lease upon the wife's property for a term of twenty-five years, the lessees obligating themselves to erect certain improvements and the lessors to have the option at the end of the term to take the improvements at a valuation to be fixed by referees, or to renew the lease on the same terms and conditions for an additional twenty-five years, time was of the essence of the contract giving the right of election to renew, and the lessors by failing to make their election on the day the term expired lost their right to force a renewal of the lease, and became bound for the value of the improvements according to the terms of the lease.
2. **SAME—TIME OF EXPIRATION OF TERM.**—The term having commenced on the first day of June, 1867, expired on the first day of June, 1892, and that was the last day for making the election.
3. **CONTRACT BINDING ON WIFE.**—The agreement to take and pay for the improvements, giving a lien on the property to secure the payment, was not a collateral undertaking, but a direct and positive one, and was therefore binding on the wife.
4. **POWER OF WIFE TO MORTGAGE HER ESTATE FOR HUSBAND'S DEBT.**
—Even though the wife had no power to bind herself personally, the husband was personally bound, and the wife had the power to bind her estate by mortgage to secure his obligation; and the lease, in so far as it created a lien, was in effect a mortgage. And it is not material that the obligation was to take effect in future.

RICHARDS, WEISSINGER & BASKIN FOR APPELLANTS.

1. Covenant to renew is a right of the lessee. (Wood on Landlord and Tenant, p. 675.)
2. The lessors having declined to buy, the lease was binding for fifty years. (Taylor's Landlord and Tenant, sec. 38; Taylor's Landlord and Tenant, sec. 43; Wilkinson v. Pettit, &c., 47 Barb., 230; Kramer v. Cooke, 7 Gray, 550; Holley v. Young, 66 Me., 520; Weed v. Crocker, 18 Gray, 220; Russman v. Ganster, 72 Penn. St., 285; Jackson v. Kisselback, 10 John., 326; Deloshman v. Berry, 20 Mich., 292; Poole v. Brently, 12 East. (168), 402, new ed.; Shaw v. Farnsworth, 108 Mass., 357; Wood on Landlord and Tenant, p. 678, note 3; Holman v. Abrams, 2 Duer. (N. Y.), 435; Wood on Landlord and Tenant, p. 674; Ryder v. Gennet, 2 Robertson (N. Y.), 56.)

Bullock, &c., v. Grinstead & Co.

3. Appellees were not entitled to exercise the option. Cases explained: *Williamson v. Johnson*, 4 Mon., 253; *Darling v. Hoband*, 53 Mich., 599.
4. Appellees must hold under the lease or vacate. (*Wood on Landlord and Tenant*, p. 672; *Pearce v. Holden*, 8 Barb., 522; *Rutgers v. Hunter*, 6 John. Chy., 215.)
5. No claim can be asserted for value of improvements without express contract. (*Wood on Landlord and Tenant*, sec. 416, p. 672; *Cutter v. Smith*, 2 Wall., 491; *Gudgell v. Duvall*, 4 J. J. M., 229; *Lawrence v. Knight*, 11 Cal., 298.)
6. The agreement to buy improvements or renew was a personal covenant. (*Taylor on Landlord and Tenant*, sec. 263; *Wood's Landlord and Tenant*, secs. 336 and 337; *Spencer's Case*, 1 Smith's Lead. Cases; *Thompson v. Rose*, 8 Cowan, 262; *Blount v. Harvey*, 6 Jones (N. C.), 186; *Kellogg v. Robinson*, 6 Vt., 276; *Masary v. Southworth*, 9 Ohio St., 340; *Hicks & Gill v. Doty*, 4 Bush, 420.)
7. Appellees at best can only claim to be made whole. (*Connelly v. Brantsler*, 3 Bush, 702, and *Schmidtheimer v. Eiseman*, 7 Bush, 298, explained; *Thomas v. Thomas*, 16 B. Mon., 420.)

WILKINS G. ANDERSON OF COUNSEL ON SAME SIDE.

1. The lease has none of the elements of a mortgage. (*Boone on Mortgages*, secs. 8, 41; *Payne's Adm'r v. Patterson's Adm'r*, 77 Pa. St., 134-137; *Adams v. Stevens*, 49 Me., 362; *Freeman's Bank v. Vose*, 23 Me., 98; *Hamilton v. Wagner*, 2 Mar., 334.)

If the instrument was not a mortgage at its inception it could not by any subsequent event be converted into a mortgage. (*Boone on Mortgages*, sec. 45; *Kearney v. Maccomb*, 16 N. J. Eq., 189.)

2. Mrs. Bullock's power was restricted by force of the statute to passing her title for the term of the lease. She is not bound by the covenants of the lease. (*Sharpe v. Procter*, 5 Bush, 396; *Curd v. Dodd*, 6 Bush, 681; *Stewart on Husband and Wife*, secs. 407, 410, 415; *Leonis v. Lazzarovich*, 55 Cal., 55; *Silliman v. Cummings*, 13 Ohio, 118; *Bishop on Law of Married Women*, vol. 1, ed. 1871, sec. 601; *Felkner v. Tighe*, 39 Ark., 357; *Stidham v. Matthews*, 29 Ark., 650; *Hawley v. Tuyman*, 29 Gratt., 728; *McBryde v. Wilkinson*, 29 Ala., 662; *Moreau v. Detchemendy*, 18 Mo., 522.)
3. In the absence of an agreement to do so the law imposes no obligation on the landlord to pay for improvements the tenant has made during his term. (*Taylor's Landlord and Tenant* (seventh ed.), sec. 335 a; *Kutter v. Smith*, 2 Wall., 491; *Gudgell v. Duvall*, 4 J. J. Mar., 229; *Lawrence v. Knight*, 11 Cal., 298; *Taylor v. Baldwin, &c.*, 10 Barb., 582; *Hite v. Parks, &c.*, 2 Tenn. Chy., 373.)
4. The covenants in the lease were personal. (*Thompson v. Rose*, 8 Cow., 266; *Taylor's Landlord and Tenant* (seventh ed.), secs. 436, 261;

Bullock, &c., v. Grinstead & Co.

Port v. Jackson, 17 Johns., 289; Garner v. Byard, 23 Ga., 289; Bailey v. Wells, 8 Wis., 157.)

5. The option to renew is with the lessee. (Bruce, &c., Ex'ors v. Fulton Nat. Bank, 79 N. Y., 154; Taylor's Landlord and Tenant (seventh ed.), sec. 49, note; Myers, Adm'r, v. Stilljacks, 58 Md., 319; Banks v. Haskie, 45 Md., 207; Taylor's Landlord and Tenant (seventh ed.), sec. 339; Eaton v. Lyon, 3 Ves., Jr., 690; McAlpine v. Swift, 1 Ball & B., 285; Pierce v. Golden, 8 Barb., 522; Rutgers v. Hunter, 6 Johns. Chy., 215; Hood v. Hartshorn's Adm'r, 100 Mass., 117; Hansen v. Myer, 81 Ill., 321; Gardner v. Watson, 18 Bradw., 886; Johnston v. Bates, 48 N. Y. Sup. Ct., 180; Gibson v. Holden, 115 Ill., 199.)

JOHN B. BASKIN FOR INFANT APPELLANTS.

1. The first term ended at 12 o'clock at night on June 1, 1892. (Wood's Landlord and Tenant, sec. 82.)
2. The obligation to either renew the lease or buy the improvements was obligatory upon the lessors, but was not correspondingly binding upon the lessees. This provision created a mere privilege, of which they could avail themselves or not as they might elect. (Smith v. Rector of St. Phillips Church, 107 N. Y., 612; Baurman v. Binzen, 65 Hun, 40.)
3. This contract can not be specifically performed without the landlord first making his election to renew the lease or take the improvements. Neither the chancellor nor the tenant can make the election for the landlord, even if the landlord flatly refuses to do it for himself. (Cases cited above.)
4. The most that Grinstead & Co. could demand would be an order compelling the landlord to make his election and to execute the election when made. They would have to choose their appraiser before they could maintain this action at all, and when such appraiser is chosen the court would compel the landlords to choose their appraiser within a certain time, and when the appraisal is made the court would then order the landlords to take the property or give the renewal. (Colson v. Thompson, 3 Wheat., 336-341; Harvie v. Banks, 1 Randolph, 408.)
5. At the time of the expiration of the first term there was no trustee in existence; no one, therefore, empowered to make an election. For that omission these infant remaindermen are not responsible. The only person who could make an election in behalf of these infants, if such an election was necessary, would be a chancellor.

BLAIN & KINKEAD AND HELM & BRUCE FOR APPELLEES.

1. A privilege to a lessor to renew his lease at the expiration thereof must be exercised on or before the expiration. (Renoud v. Dascon, 34

Bullock, &c., v. Grinstead & Co.

Conn., 512; Thiebaud v. First National Bank, 42 Ind., 212; Darling v. Hoban, 53 Mich., 599.)

2. A valid lien was created by the instrument in question to secure the payment of the value of the improvements when the lease should expire.

The lessees were not given a mere option or right to erect these improvements, they were *bound absolutely* to erect them; and Judge Bullock was bound absolutely to pay for them; and a lien was given upon this property to secure that obligation whenever it should mature. The parties to this instrument simply did in express terms what the law would have held to be the effect of the terms employed if they had executed a technical mortgage, and it makes no difference whether you call the instrument a "mortgage" or not. (Jones v. Jenkins, 83 Ky., 395.)

Under the Kentucky statute giving married women the power to convey their land by deeds executed with certain formalities, they have the absolute power of disposition over the land, or any interest therein, by any form of conveyance or for any purpose. (Smith v. Wilson, 2 Met., 236; Johnson v. Ferguson, *Idem*, 505.)

3. The question of whether or not the covenant ran with the land is not material, because we do not ask a personal judgment against the present owners of the land. We merely ask the enforcement of the lien upon the land itself.

Cases commented on and explained: Hansen v. Myer, 25 Am. Rep., 282; 81 Ill., 321; Thompson v. Rose, 8 Cow., 266; Blount v. Harvey, 6 Jones, 186.

4. The contract bound the lessor to pay for the improvements as it bound the lessee to make the improvements, the only question left being as to whether the lessor should permit the tenancy to expire with the end of the first term, or whether he would renew it for the second term. If he failed to elect to renew he was bound to pay for the improvements; so that no election was necessary.

But if it still be argued that such election was provided for, then this position is answered by the proposition of law, that if one party to a contract has a right of election until a certain time as between two courses to be pursued, and he fails to exercise that right, and the case is such that the election must be made by somebody, then the right of election passes to the other party to the contract. (Williamson v. Johnson, 4 Mon., 253, 256; Viner's Abridgment, vol. 9, p. 362; Story on Contracts, sec. 816; 1 Bouvier's Institutes, sec. 693.)

5. Whether viewed from the standpoint of what it would cost to erect the building, or from the standpoint of the capitalization of its rental value from averaging a long period, or from the standpoint of expert opinion, it is worth at least the sum fixed by the chancellor, which was \$23,375.

Bullock, &c., v. Grinstead & Co.

CHIEF JUSTICE BENNETT DELIVERED THE OPINION OF THE COURT.

In 1867, Mrs. Mary Bullock, wife of Judge W. F. Bullock, owned as general estate a lot of ground in the city of Louisville, with the power to dispose of the same by will. Mrs. Bullock and her husband, on the 17th day of April, 1867, made and acknowledged, and had recorded, a contract with the firm of McKee & Cunningham, in substance as follows: They leased to said firm said lot "for the term of twenty-five years," commencing the 1st of June, 1867. The firm was to pay therefor three thousand dollars per annum, payable quarterly, being six per cent on the then estimated value of said property, and to pay all taxes assessed on the property. The property, at the option of either party, was to be periodically valued, and the firm was then to pay six per cent per annum on said valuation. The firm was also to erect upon said lot a stone or brick building of not less than eight thousand dollars in value, which was to be fully completed by the 1st of September, 1867, and to keep the same insured, and the building was to be liable for the rent reserved and all taxes assessed against the property. It was also agreed that "at the end of the *term aforesaid*, it shall be optional with the lessors to take the improvements which shall be erected thereon at a valuation to be fixed by referees, . . . payable in four equal installments, a lien being herein created and reserved on said premises for the payment of the same, or to *renew* the lease for same, on the same terms and conditions and stipulations contained herein, for an *additional* twenty-five years." It was also agreed that if the lessors should "renew the lease at the end of the second term of twenty-five years, they should take and pay for said improvements at a valuation

Bullock, &c., v. Grinstead & Co.

to be fixed by referees, the payments to be made in cash or in five equal installments, and the payment of the same is secured by a lien on said premises." Said firm assigned the lease to the firm of Monks & Cobb, and that firm assigned the same to the appellees. The conditions of the lease have been complied with by the appellees. There is no dispute about that matter. The first term of the lease expired on the 1st of June, 1892, and both Mrs. Bullock and her husband having died sometime before then, and Mrs. Bullock having, pursuant to the power, willed said property to the appellants, the appellees, on the 2d day of June, 1892, notified them that not having exercised their option to renew they considered the lease at an end, and would like to confer with them in reference to making a new lease. The appellants made no answer until several days had elapsed. They then denied that the lease had expired or that their right to renewal had expired, and claimed the right then to renew. The appellees then brought this suit to recover the value of the improvements, etc. The appellants denied that the lease had expired, and that Mrs. Bullock was bound by said contract to pay for the improvements, etc.

By the terms of the contract of lease, "*the term was twenty-five years, beginning from the 1st day of June, 1867.*" "At the end of the term aforesaid it was optional with the lessors" to renew the lease, upon the same terms and conditions, for an additional twenty-five years, and if the option to "renew" was exercised, the terms of payment for the improvements were different from the terms of payment for the improvements in case the lessors elected to take them at the end of the first twenty-five years. If the language used to express the contract is to

be construed according to its common sense meaning (and there is no good reason why it should not be so construed), it means that the term of lease was twenty-five years and at the end of which time the lease expired, unless the lessors elected to "renew" for the term of twenty-five years more, in which event the lessees were bound to renew; and in case the lessors did not elect to renew the lease at the end of the term, they were to take and pay for the improvements upon the terms stipulated in the lease. We have no doubt that foregoing is the correct interpretation of the lease. Also it seems clear that as to the making the election to renew, time was of the essence of the contract, and the lessors were bound to make the election to renew the lease if they wished to do so upon the expiration of the first lease which was on the 1st day of June, 1892, and their failure to make the election on that day was an abandonment of their right to force a renewal and an election to take and pay for the improvements according to the terms of the lease, and which the lessees could enforce. And as the lessees were unconditionally bound by the lessors' option, it would seem to follow that the option should have been exercised upon the expiration of the lease.

But it is urged that the agreement to take and pay for the improvements was not binding on Mrs. Bullock because it was collateral to the lease and stood upon the same footing as to its binding force as a covenant of warranty in a married woman's deed, which has been held by this court not to bind her. Also that the lien reserved in the lease on the premises to secure the payment of the improvements was not binding on Mrs. Bullock, because it was an obligation to take effect *in futuro* and not *in*

præsenti, which was not binding upon her; and second, she can only bind herself by a mortgage lien, and the lien created by the lease not being a mortgage lien, she was not bound by it.

But it seems to us that the obligation was not a collateral one, but a direct and positive one to pay for improvements contracted to be put upon her property and to secure the payment for the improvements by lien upon the property. She had the legal right to sell and convey the title to her land, or such interest therein as she and her husband might choose; and she and her husband did choose to sell the exclusive right to the land for the term of twenty-five years. She and her husband also agreed with the lessees that they should erect improvements on the property worth not less than eight thousand dollars, which was to be paid for at a fair valuation at the end of the term, and a lien was given on the property to secure the payment. Now, here was a direct and positive agreement to pay for the improvements to be erected on her property, and a lien reserved to secure the payment. Let us concede, however, for the sake of the argument, that she had no power, by simple contract, to bind her estate for the payment of the improvements. But what is to be done with the lien that she created on her premises to secure the payment? But it is said that she had no power to create the lien for such purpose, because it is not a mortgage, and that she can only create a lien by mortgage. It is a fact that a mortgage is simply a lien created on property to secure the performance of a certain undertaking. It is also a fact that the husband and wife may execute a mortgage upon her landed estate that will bind it, to secure the performance of his undertaking or

obligation, or the undertaking or obligation of a third person, although she can not bind herself personally. It is also a fact that as a mortgage is nothing but a lien created on an estate to secure the performance of an obligation which the wife may give upon her estate, a lien which she creates upon it by an instrument, just as solemn and formal, to secure the performance of an obligation, though not called a mortgage, is just as binding on her. The term "mortgage" used in a writing indicates a lien, and is enforceable without the addition of other formal words, and the expression, a "lien" is created to secure the performance of an obligation, is equivalent in meaning that the thing is mortgaged. Now, conceding that Mrs. Bullock was not personally bound by her contract to pay for the improvements, it will not be denied that Judge Bullock was personally bound by it, and was bound to pay for the improvements the sum that the referees put upon them, and Mrs. Bullock had the power to secure the performance of his agreement by giving a lien upon her property; and as she did give such lien in due and legal form and manner, the estate is bound for the payment of the price of the improvements. We think that there is nothing in the talk about Mrs. Bullock not being bound by the contract in reference to a lien, because it was made to take effect *in futuro*, for the reason, as we have just seen, that Judge Bullock had the right to make the contract and Mrs. Bullock had the power to secure its performance by giving a lien on her property. If he could make a binding contract upon himself to commence *in futuro*, and there is no doubt that he could in this case, she had the power to secure its performance by giving a lien upon her property.

The judgment is affirmed.

Asher v. Brock, &c.

CASE 45—PETITION EQUITY—JANUARY 30.

Asher v. Brock, &c.

APPEAL FROM HARLAN COURT OF COMMON PLEAS.

1. A VERBAL SALE OF LAND IS VOID and confers upon neither party any equitable interest whatever, but only such collateral equities as may arise out of the transaction, such as giving the purchaser a lien on the land for the purchase money paid, if the possession has been transferred pursuant to the verbal purchase.
2. IN AN ACTION TO ENFORCE A PAROL CONTRACT FOR THE SALE OF LAND, although the admission of the contract by the vendor in his answer be treated as a written confirmation of the sale, it can not relate back to the date of the parol contract so as to overreach an intervening sale and conveyance of the land to another, even though the person to whom the land has been thus sold and conveyed purchased with notice of the prior parol contract. But the parol purchaser may assert a lien on the land for the purchase money he has paid, provided he obtained possession of the land by reason of his purchase, and the subsequent purchaser had notice of his equity at the time he purchased.

WM. LINDSAY AND EDWARD W. HINES FOR APPELLANT.

The legal title not being in the vendor, his answer waiving his right to rely upon the statute, and asking in effect that a deed be made to plaintiff, should be given the same effect that would be given to a deed executed by him to plaintiff if the legal title had been in him. He was under a moral obligation to see that a conveyance was executed by his vendor to his vendee, or those claiming under his vendee, and James Gross, having purchased with notice of that obligation, took subject to the right of the vendor to repent and convey, or have a conveyance executed, pursuant to the parol contract. (Clay v. Marshall, 5 B. M., 269; Lucas v. Mitchell, 3 Mar., 245.)

THOMAS H. HINES AND J. G. FORRESTER FOR APPELLEES.

Brief not in record.

CHIEF JUSTICE BENNETT DELIVERED THE OPINION OF THE COURT.

The land in controversy was granted by the Commonwealth to Hiram Brock and sold by him to Silas Saylor, and by him to John G. Saylor, and by him to Samuel

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Caldwell, and by him to George Gross. All of these sales were by parol, except the one by Hiram Brock to Silas Saylor, which was by title bond; but no deed was ever thereafter made by Hiram Brock to Silas Saylor. After the death of George Gross, Rachel Gross, his only heir, sold the land to the appellant by title bond. Thereafter, James Gross, who had been sued by Rachel Gross for cutting timber from the land, discovering that Silas Saylor had never conveyed the land by writing, procured from him a general warranty deed for the same. The legal title being still in the heirs of Hiram Brock, and the equitable title being in Silas Saylor, James Gross also purchased their supposed interests, taking from some of them deeds, from others bonds for a title.

At the time James Gross made the purchases from Silas Saylor and the Brock heirs he knew of the said verbal purchases, and that each of them was for a valuable consideration, which had been paid. The title being in this condition, the appellant, being a verbal purchaser, sued Silas Saylor and the Brock heirs for a conveyance; James Gross was made defendant, and the prayer against him was that he be compelled to surrender his title. To this petition Silas Saylor filed an answer admitting that he made the verbal sale to John G. Saylor, and admitting that he asserted no claim to the land after making that sale, but also admitting that he had thereafter sold the land by deed to James Gross. It is now contended that Silas Saylor's admission that he had verbally sold the land to John G. Saylor was equivalent to a written confirmation of that sale, and related back to its date, which overreached the intermediate written conveyance that was obtained by James Gross with notice of the verbal sale.

Asher v. Brock, &c.

This contention is sought to be maintained upon the old theory of this court that a verbal sale of land was not void, and that while no action could be maintained thereon to compel a conveyance, it passed an equity for many purposes, etc. But this court, in later years, has reviewed that doctrine, taken it back, and announced in its stead that a verbal sale or division of land, even though held in partnership, is void, and confers upon neither party any equitable interest whatever, but only such collateral equities as may arise out of the transaction, such as giving the purchaser a lien on the land for the purchase money paid, if the possession has been transferred pursuant to the verbal purchase. (See *Usher, &c., v. Flood*, 83 Ky., 552; *Newburger v. Adams*, 92 Ky., 27; *White v. O'Bannon*, 86 Ky., 93; *Duncan v. Duncan*, 93 Ky., 37.)

If Silas Saylor had made a deed to John G. Saylor after he had conveyed the land by deed to James Gross, it would not have overreached James Gross' deed, even though James Gross, at the time he received his deed, had notice of John G. Saylor's verbal purchase, because, as the verbal purchase was void and could not be enforced by either party at law or in equity, James Gross had the right to make his purchase valid by obtaining the legal title to the land from Silas Saylor, who held it, and from whom the verbal purchaser could not force the legal title. This view of the case does not interfere with John Saylor's right to assert a lien on the land for the purchase money that he has paid, provided he obtained possession of the land by reason of the purchase, and that James Gross had notice of the same at the time he verbally purchased it.

The judgment is affirmed.

Commonwealth v. Three Forks Coal Company.

CASE 46—PETITION ORDINARY—FEBRUARY 3.

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Commonwealth v. Three Forks Coal Company.

APPEAL FROM LEE COURT OF COMMON PLEAS.

1. **RIGHT OF STATE TO SUE FOR LAND PURCHASED AT TAX SALE.**—The State, having purchased land at a tax sale, has the right under the statute to sue for and recover possession of the land so purchased, if not redeemed within the time prescribed.
2. **TO MAKE A TAX SALE VALID** and give to the purchaser, whether the State or an individual, right to recover possession of the land so sold for taxes, there must be a substantial compliance with all the requirements and conditions of the statute. Therefore, in this action by the Commonwealth to recover possession of land purchased at tax sale, the petition failing to allege that defendant had no personal property in the county subject to distraint for the taxes due, a general demurrer was properly sustained, as a sale of the land could not be legally made if there was such personal property out of which the taxes could be paid.

WM. J. HENDRICK, ATTORNEY-GENERAL, FOR APPELLANT.

The petition is good and the defendant should be compelled to plead to it. The demurrers do not reach to a defect of parties, but even if they did the parties are properly joined.

Cited in petition for rehearing: *Husbands v. City of Paducah*, 4 Ky. Law Rep., 992.

G. W. GOURLEY FOR APPELLEE.

Brief not in record.

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

This action was brought in name of the Commonwealth of Kentucky and Lee County as joint plaintiffs against the Three Forks Coal Company, a corporation, to recover possession of a tract of 1,004 acres of land previously sold as defendant's property for taxes of the year 1891, and purchased for the State. To the original petition both a special and general demurrer were filed:

Vol. 95—18

but there was to the amended petition only a general demurrer, the judgment on trial of which, being the only one rendered, is in these words: "The demurrer to plaintiff's petition being heard the same is sustained, and plaintiff failing to plead further is dismissed."

Though Lee County does not seem to have any interest, joint or several, in the subject of action, and as a consequence there was a misjoinder of parties; still, as only the general demurrer appears to have been passed on, we deem it proper and pertinent on this appeal to inquire and determine whether sufficient facts are stated in the pleadings to constitute a cause of action in favor of the Commonwealth of Kentucky. The statutory provisions under which this action was brought are contained in article 9, chapter 92, General Statutes, and were re-adopted by "an act relating to Revenue and Taxation," which became law November 11, 1892.

Section 16, article 9, provides that if no one will bid for and purchase land exposed for sale to pay taxes, it shall be the duty of the sheriff or tax collector making the sale to purchase same for the State of Kentucky at amount of tax due and commission thereon. But the owner of such land has the right to redeem at any time within two years after the day of sale, by paying purchase money, with interest at rate of thirty per cent per annum, and, in addition, fifteen per cent on total amount of purchase price, and clerk's cost, if any. It is further provided in same section as follows: "The State shall have the right of possession of lands purchased by it at any time after the expiration of thirty days from the giving of the notice provided for in the next section; and the purchaser other than the State shall have the

right of possession of the land purchased by him at any time after expiration of six months from the giving of the notice provided for in the next section."

Section 17 makes it the duty of the county attorney, within fifty days after sale, to notify the owner of land so purchased by the State of such purchase; and if not redeemed within thirty days from such notification, to institute proceedings for recovery of possession, the owner being required to pay cost of proceedings. It is also therein provided that failure of a county attorney to give such notice and institute the required proceeding within time specified shall subject him to fine for each offense.

The purpose of enacting such statute, which in no way oppresses the delinquent taxpayer, is simply to stimulate him to redeem his land by paying what is due, under penalty, in case of failure to redeem, of losing possession and ultimately title to his land. And the language used plainly gives to the State, being purchaser at a tax sale, right to sue for and recover possession of land so purchased if not redeemed within time prescribed. But to make a sale valid, and to give, as a consequence, to the purchaser, whether the State or an individual, right to recover possession of land so sold for taxes, there must be a substantial compliance with all requirements and conditions of the statute.

In Cooley on Taxation, p. 353, it is said: "Whoever claims land under a sale for delinquent taxes must take upon himself the burden of proving that the taxes were duly assessed and a charge on the land, and the successive steps were taken which led to a lawful sale thereunder, at which he or some one under whom he claims became purchaser." That rule has been directly approved by

Commonwealth v. Three Forks Coal Company.

this court in *Whipple v. Earick*, 93 Ky., 121; *Smith v. Ryan*, 88 Ky., 636; and it seems to us it is applicable as well where the State as an individual has become purchaser.

It is substantially and fully enough alleged in the petition as amended that the land in question was assessed for taxation; what amount of taxes were due; and that prior to the sale payment thereof was demanded of defendant, a receipt therefor being tendered. It is further alleged that the county attorney of Lee County, where the land lies and was assessed, had, in manner and time required by section 17, notified defendant of said sale and purchase for the State, and that proceedings would be instituted to recover possession of the land unless redeemed within thirty days, which was not done. But the statute provides in terms not only that personal property shall be first subjected to pay taxes, but in express language of section 15 makes a condition of a valid sale of land for such purposes, that "there be no personal property the sheriff or tax collector can distrain for taxes due." There is no allegation in the pleadings that defendant had no personal property in Lee County subject to distraint for the taxes due; and as a sale of the land in question could not be legally made if there was such personal property out of which the taxes could be made, it follows there was a failure of plaintiff to state a fact essential to constitute his cause of action, and the general demurrer was properly sustained.

Judgment affirmed.

Chaffin v. Fulkerson.

CASE 47—PETITION ORDINARY—FEBRUARY 8.

Chaffin v. Fulkerson.

APPEAL FROM LAWRENCE CIRCUIT COURT.

1. A PETITION IN EJECTMENT describing the land sought to be recovered as forty acres, a part of a certain survey described by metes and bounds, was sufficiently definite. But if not, as the plaintiff alleged that he did not know and could not ascertain the boundary of the forty acres, and called upon defendant to give it, the defendant failing to answer, the petition was properly taken for confessed, and judgment rendered for the recovery of the land, giving the boundary.
2. NEW TRIAL.—The court properly refused to set aside the default judgment and allow the defendant to file answer, as he was given thirty days after his demurrer was overruled in which to file answer, and offered no excuse for his failure to do so, except that he was ignorant of his duty in that regard. The fact that his attorney said to him after his demurrer was overruled that he could go home, did not give him reason to believe that the case had been finally disposed of.
3. APPEARANCE.—The defendant by filing a general demurrer to the petition entered his appearance.

ALEXANDER LACKEY FOR APPELLANT.

The judgment is void, and for the error of the court in refusing to set it aside, it should be reversed. (Civil Code, secs. 125, 763; *Blackwell v. Townsend*, 13 Ky. Law Rep., 290; *Dorsey v. Kendall*, 8 Bush, 294; *Anthony v. Kasey*, 5 Am. St. Rep., 27; *Falls v. Wright*, 29 Am. St. Rep., 74; *Seamster v. Blackstock*, 5 Am. St. Rep., 262.)

WM. M. FULKERSON FOR APPELLEE.

1. The appellant has utterly failed to account for his absence; but even if he had done so, that would not be sufficient to entitle him to have the judgment set aside. He must also show due diligence in his preparation. (*Musson v. Collins*, 1 Mar., 350.)
2. The petition was good, and the answer tendered did not present a sufficient defense.
3. After the term a final order or judgment can not be vacated, except in the mode prescribed by secs. 344, 519 and 520 of the Code and for the causes mentioned in sections 340 and 518. (*Hocker v. Gentry*, 3 Met., 463; *McManama v. Garnett*, 3 Met., 517.)

Chaffin v. Fulkerson.

CHIEF JUSTICE BENNETT DELIVERED THE OPINION OF THE COURT.

The appellee was ruled to make his petition more definite. He attempted to do so, but failed. And on the 18th of September, 1889, he filed in court a petition as a substitute for the original petition and amendments. The substituted petition alleged that the appellee was the owner of seven hundred and thirty-three acres of land, giving its metes and bounds. It was alleged that the appellee had the possession of the survey, except the parcels that two of the defendants held, without right, which parcels were described by metes and bounds in their answers thereto, filed in this case. It was alleged that the appellant also held the possession of a parcel of said land without right, containing forty acres, but that the appellee was unable to give its boundary, and he called upon the appellant to give it. The appellee also asked that his title be quieted and that he have judgment for the possession of said forty acres of land.

The appellant filed a demurrer to this substituted petition, which was overruled, and the appellant was allowed thirty days in which to file an answer. But he made no answer, and at the August term of the court, 1890, the petition was taken for confessed, and judgment was rendered in favor of the appellee for the possession of the forty acres of land, giving its boundary. At the August term, 1892, the appellant tendered answer, controverting the allegations of the petition; also tendering his affidavit, attempting to explain why he failed to file his answer in proper time. The substituted petition set up an action of ejectment against the appellant for the possession of forty acres land, and also an action to quiet his title to the remainder. If it be urged that the forty acres of

Chaffin v. Fulkerson.

land was not definitely described in the petition, it is sufficient to say that it is described as a part of a certain survey, which was sufficiently described; and which, we think, is sufficient to support an action of ejectment. But if we are mistaken in this, the petition alleges that the appellee could not give the boundary of the forty acres, because he did not know it and could not ascertain it; but that the appellant did know it, and he was called upon to give it, which he failed to do. If it be urged that the appellant was not summoned to answer the substituted petition, it is sufficient to say that he filed and urged his general demurrer thereto, which had the effect of entering his appearance to the action, and was a waiver of the necessity of a summons.

The appellant says in his affidavit as an excuse for not appearing and filing his answer, that at the next term of court after the demurrer was filed and acted on, he was prevented from attending court by sickness in his family. It is to be observed that the judgment was not rendered at the next term of court, but at the term after that, and he gives no valid reason for not appearing at that term. Besides, the appellant had plenty of time to have filed his answer, and he offers no excuse for his failure to do so, except that he did not know what his rights and duties were in that regard. But this excuse simply victimizes him to the old adage, "when knowledge is a duty, ignorance is a crime."

But it is said that the appellant was advised by his attorney, at the time that the demurrer was overruled, that he could go home. This advice was proper; but it did not mean that the case was finally disposed of, and if the appellant so understood it, he was unfortunate.

The judgment is affirmed.

Couadeau v. American Accident Co.

CASE 48—PETITION ORDINARY—FEBRUARY 3.

Couadeau v. American Accident Company.

APPEAL FROM LOUISVILLE LAW AND EQUITY COURT.

1. **ACCIDENT INSURANCE—PEREMPTORY INSTRUCTION.**—Where in an action upon an accident insurance policy it is shown that the insured was found dead in the water, the jury have the right to presume that he came to his death by accidental drowning, and plaintiff is entitled to have the question submitted to them.
2. **SAME.**—Where the plaintiff has first made out his case it is not within the province of the court to take its consideration away from the jury on the proof of the defendant, unless such proof is in the nature of an absolute bar to the recovery. Therefore, in an action upon an accident insurance policy in which one of the defenses was that the insured came to his death while under the influence of intoxicating drinks, which, if true, was by the terms of the policy a bar to a recovery, the fact that the uncontradicted testimony for defendant showed that the insured was drunk when last seen alive, under circumstances which created a strong probability that in a short time thereafter and while in the same condition he accidentally fell into the river in which his dead body was afterward found, did not authorize the court to give a peremptory instruction to find for defendant, as the testimony showed only a probability, though a strong one, that the insured was drunk at the time of his death.
3. **ERROR IN GRANTING NEW TRIAL.**—Although the lower court erred in setting aside a former verdict for plaintiff upon the ground that it was against the evidence, this court will not now direct a judgment to be entered for plaintiff upon that verdict, for while it has in some cases given such a direction, yet where, as in this case, the defense is supported by strong probabilities, and in the opinion of the trial judge presents an absolute bar to a recovery, the court is not inclined to apply that rule.
4. **SAME—EXCLUSION OF DEPOSITIONS.**—Although the court upon the former trial erred in overruling exceptions to defendant's depositions upon the ground that the witnesses resided within twenty miles of the court house, this court will not treat the case as if the depositions had not been read, and for that reason direct the entry of judgment upon the first verdict, as the defendant should not be prejudiced by the court's error, but have an opportunity to produce the witnesses at another trial.

O'NEAL, PHELPS & PRYOR FOR APPELLANT.

1. Where a new trial is improperly awarded and the second verdict is for

Couadeau v. American Accident Co.

the party obtaining the new trial, it will be ordered by the Court of Appeals to be set aside and judgment entered on the first verdict. (*Hutcheson v. Plummer*, Sneed, 322; *Brevard v. Graham*, 2 Bibb, 177; *LeGrand v. Baker*, 6 Mon., 243; *Meek & McCall v. Patton*, 12 Ky. Law Rep., 796.)

2. The court erred in granting the new trial upon the ground that the weight of the evidence was that the deceased was under the influence of liquor when the accident resulting in his death occurred.
3. Exceptions to the depositions read by the defendant should have been sustained. (*Civil Code*, sec. 554; *Gillespie v. Gillespie*, 2 Bibb, 90; *Johnson v. Fowler*, 4 Bibb, 521; *Gilly v. Singleton*, 3 Litt., 250; *Taylor v. Whitney*, 4 Mon., 366; *Tolly v. Price*, 17 B. M., 411.)
4. The court should not have given peremptory instruction upon the second trial of the case, but should have submitted to the jury the question as to whether or not the drowning was accidental. (*Trew v. Passengers Ins. Co.*, 6 H. & N.; *Mallory v. Travelers Ins. Co.*, 47 N. Y., 52; *Travelers Ins. Co. v. McConkey*, 127 U. S., 661; *Peck v. Equitable Ins. Ass'n*, 52 Hun, 255; *United States Mutual Accident Co. v. Barry*, 131 U. S., 100; *Allen v. Willard*, 57 Pa. St., 380; *Whitney v. Cliffner*, 57 Wis., 157; *McDonald v. Refuge Assurance Co.*, 27 Scottish Rep. (July 28, 1890), 764; *Winspear v. Accident Ins. Co.*, 6 L. R. & S. B. Div., 42; 7 American Reporter, 410.)

B. F. BUCKNER FOR APPELLEE.

1. It is unnecessary for appellee to prove that drunkenness contributed to the accident, for if the condition of the deceased at the time of the accident was that of being under the influence of intoxicating drinks, there was a breach of the fundamental terms of the policy, which rendered it void without regard to whether that condition did or did not contribute to the accident. (*Shader v. The Railway Passenger Assurance Co.*, 66 N. Y., 441.)
2. There being no countervailing testimony to overcome the unimpeached testimony of four or five witnesses as to the decedent's condition, "the plaintiff failed to make out his case," and a peremptory instruction was proper. (*Ky. Cent. R. Co. v. Talbot*, 78 Ky., 622.)
3. The court did not err in granting a new trial after the first verdict. (16 Am. and Eng. Ency. of Law, pp. 503, 554; *New Jersey Flax Co. v. Mills*, 26 N. J. L., 60; *Chicago R. Co. v. Stumps*, 69 Ill., 409; *Blake v. McMullin*, 91 Ill., 32; *Wood v. Barker*, 49 Mich., 295; *McAfee v. Robinson*, 41 Texas, 355.)

The action of the trial court in granting a new trial is entitled to great weight on appeal. (16 Am. and Eng. Ency. of Law, 692; *Albion Consolidated Mining Co. v. Richmond Mining Co.*, 19 Nev., 225.)

4. The exceptions to depositions were properly overruled on the first trial, because they were not filed before the commencement of the trial. (*Eatham v. Curd*, 15 B. M., 102; *Civil Code*, sec. 587.)

Couadeau v. American Accident Co.

5. If the court did err in permitting the depositions to be read on the first trial, the error was ~~not~~ prejudicial to appellant, because the jury found for appellant notwithstanding the error. Nor will the court exclude the depositions in considering the sufficiency of the evidence to support the first verdict and order judgment for appellant upon the verdict as if the depositions had not been read. The defendant should not be prejudiced by the court's error, if any, but should have an opportunity to produce the witnesses at another trial.
6. There were no exceptions to the depositions on the last trial, and therefore the court did not err in admitting them.

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

Eugene Couadeau, the husband of the appellant, held an accident policy of insurance for \$5,000 on his life in the appellee company.

The petition of the appellant, filed in the Jefferson Court of Common Pleas, avers that on or about the 14th day of March, 1890, the exact time being unknown, her husband, "through external, violent and accidental means, fell into, or by some means got into, the Ohio River or canal, and was drowned."

The answer consists of a denial of knowledge or information of any injury or accidental means causing death, or that the required notice of death and attending circumstances had been given, and alleged the existence of one of the conditions operating under the terms of the policy to exempt the company from liability, namely, that death happened to the insured while he was "under the influence of intoxicating drinks," and that his death was "the result of his intoxicated condition."

On the first trial of the case, which occurred in November, 1891, it was shown by the appellant that the insured left his home for his place of business at the usual hour on the morning of March 14, 1890, in sound condition mentally and physically; that he was prosperous in busi-

Couadeau v. American Accident Co.

ness and happy in his domestic relations; that he went through the day in his usual good humor and spirits, and was always of temperate and industrious habits. That while not a "teetotaler," he was never known to get drunk or under the influence of intoxicants, and was not so on the day in question. That though he stated to his wife he would return at the usual hour, he had been missing for weeks, and his body was finally found in the river without marks of violence on it, and with his watch and some money in his pockets and a ring on his finger.

It was shown that the deceased resided with his family, consisting of a wife and four children, at Nineteenth and Baird streets, in the city of Louisville, and only a short distance from a canal, over which there was a bridge with low railings, and from the river, which, at the time mentioned, was very high and covered the lowlands in the vicinity of the home of the deceased.

The judgment of the coroner was that the deceased had come to his death from accidental drowning.

The appellee introduced proof to the effect that the deceased was in the habit of spending his Saturday evenings at Weber's saloon on Market street, where, on the night of the 14th of March, he was first seen about six o'clock; that he remained there until about half-past twelve o'clock engaged in playing cards for the drinks, and became very drunk according to some of the proof, and moderately under the influence of liquor according to others. That after leaving the saloon he was assisted to a coupe, having first ascertained the price of his fare and getting some money changed to pay the driver. He was driven to the corner at lower Nineteenth street and helped out, where the driver testifies he left him alone holding to a lamp-

Couadeau v. American Accident Co.

post in a helpless condition, not able to take care of himself, and at some distance from his residence. Upon this state of fact, the jury, after proper instruction, found a verdict for the appellant for the amount of the policy, and judgment was accordingly rendered in her favor.

Thereafter, the court sustained the motion of the appellee for a new trial upon the sole ground that the verdict was "contrary to the weight of the evidence," the court saying the proof was clear that "the deceased was under the influence of intoxicating liquor when drowned, which, under the policy and instructions, entitled the defendant to a verdict."

A second trial was had in June, 1892, upon the same proof theretofore offered. It was, in fact, merely formal, because the court had already reached the conclusion that the proof entitled the company to a verdict. The jury were therefore peremptorily instructed to so find. It is the contention of the appellant that the court erred in granting the new trial, and that therefore this court should reverse the judgment last rendered, with directions to enter the one rendered upon the first verdict. The appellee insists that the new trial was properly granted, and there being no error in the last one, the judgment should be affirmed.

It seems to be conceded that the burden of showing the death of the insured to have been the result of an accident was on the appellant, and of showing that the insured came to his death while under the influence of intoxicating drinks was on the appellee.

That the first proposition was sufficiently established by the proof to require its submission to the jury seems reasonably clear. There is not a circumstance pointing

in the least degree to the death of the insured by suicide. Nor was there the slightest evidence of violence or foul play upon his body, even if such would prevent recovery under the contract. It can at least be said that it seems to be a case of accidental drowning, and comes up, therefore, to the requirements of the contract of insurance.

In *Trew v. Passengers' Assurance Company*, 6 Hurl & N., 838, Chief Justice Cockburn said: "It appears that the insured went to Brighton for recreation, and there is no reason to suppose that he intended to commit suicide. He left his lodgings for the purpose of bathing; his clothes were found by the waterside, but he himself was not afterward seen. The body was found in the water a distance from where he went to bathe. . . . If they (the jury) found that he died in the water, they might reasonably presume that he died from drowning." And the non-suit ordered by the judge below was held to be error.

In *Mallory v. Travelers Insurance Company*, 47 N. Y., 52, it was shown "that the insured disappeared on Sunday evening, when he was seen walking on the railroad track; the body was found in a creek which passed under the railroad through a culvert. A motion was made for a non-suit on the ground that there was no evidence to go to the jury of death by accident. But this motion the court refused to allow, and left it to the jury to find whether death ensued by accident or not;" and on appeal it was held "that the circumstances attending the finding of the body were sufficient to require a submission to the jury of the question whether the death of the insured was the result of accident or suicide, or of some cause

not insured against." Said the court further: "It is true that the actual cause of death is not certainly proved by the evidence in the case, but when considered in connection with the presumption that sane persons do not ordinarily commit acts, the probable consequence of which will be self-destruction, it was sufficient to justify the inference that the deceased fell off, or was hurled off by a violent blow from the culvert into the stream below and was drowned."

It is settled law that mere "circumstances, sufficient to support a verdict, should be submitted to the jury," and that "the plaintiff is not bound to prove his case so clearly that it excludes the possibility of any theory." (*Allen v. Willard*, 57 Pa. St., 380; *Whitney v. Clifford*, 57 Wis., 157.)

In *Winspear v. Accident Insurance Company*, 6 L. R. Q. B. Div., 42, it was said: "When a man is found dead in the water he may be presumed to have come to his death by drowning, and not by fits or otherwise." The rule, therefore, seems to be that where a man comes to his death by accidental drowning, or by suicide, the presumption will be in favor of the accident, rather than in favor of the suicide. (*Mallory v. Travelers Ins. Co.*, 47 N. Y., 52.)

But yet, with all this, the case put by the appellee is not met; for with the conclusion reached that the plaintiff had so made out a case of accidental drowning as to entitle her to have it go to the jury, the question remains, did not the proof of the defendant so conclusively establish that the death of the insured happened while he was under the influence of intoxicating drinks as to require a non-suit? In such case, when the plaintiff is held to

have made out a case, the proof of the defendant, to entitle him to a non-suit, must be conclusive—must destroy and wholly eradicate the case of the plaintiff. Thus, if A sues B on a promissory note and is met with an admittedly genuine receipt against it, the bar to recovery is complete. If the plaintiff first make out his case, it is not within the province of the court to take its consideration away from the jury on the proof of the defendant, unless such proof is in the nature of an absolute bar to the recovery. And now, while in the case under consideration, the appellant fails to show the precise cause of the death of her husband, so, likewise, was the appellee unable to show his condition precisely at the time of his death. This, for the manifest reason that there is not a particle of proof as to when he met his death. The circumstances with all the sadly interesting features are to be scrutinized by the jury. The body of this prosperous and contented man, once happily surrounded by wife and children, of temperate and industrious habits, of intelligent business forethought, when last described in the proof in preparing for his conveyance home, was found in the water. It is shown that on the night of the 14th of March, when last seen alive by any of the witnesses in the case, he was under the influence of intoxicating liquors. The inference—the probability—may be strong that he was in that condition at the time he met his death, but certain it is that the proof is silent on that supreme question. We know the dead body was found in the water; that it bore the evidence of an accidental drowning; that the presumption, without such evidence, is in favor of the conclusion that death was accidental, rather than intentional. But we do not know that *at the*

time of the accident the unfortunate victim was under the influence of intoxicating liquors. The case should therefore be heard and determined by the jury.

There is a question as to the competency of the proof offered by the appellee on the condition of the deceased on the night of March 14th. The proof was in the form of depositions, when the witnesses resided within twenty miles of the court house. It can hardly be told whether the exceptions were filed before or after the commencement of the trial. We are inclined to think they are shown to have been filed before, and if so, they should have been sustained; and if sustained, then there is no evidence whatever in support of the defense that the insured was intoxicated or under the influence of liquors at the time of his death. For this reason it is insisted that this court should act on the case as if the depositions had not been read, and enter the first judgment. But manifestly, as forcibly put by counsel for the appellee, "if the court committed an error in overruling the exceptions to the depositions, and the defendant went to trial upon the supposition that the court was correct in its rulings, and this court should decide that the lower court erred in overruling the exceptions, common justice would require that the defendant should not be prejudiced by the court's error, but should have an opportunity to produce the witnesses at another trial."

While in some cases this court has directed the entry of the first judgment when it has erroneously been set aside, yet in a case where the defense is supported by strong probabilities, and in the opinion of the trial judge

 Schmidt, Trustee, v. Louisville & Nashville Railroad Co.

presents an absolute bar to a recovery, we are not inclined to apply the rule contended for.

The judgment is therefore reversed, with directions to grant the appellant a new trial on principles consistent with this opinion.

CASE 49—PETITION EQUITY—FEBRUARY 8.

Schmidt, Trustee, v. Louisville & Nashville Railroad Company.

APPEAL FROM LOUISVILLE LAW AND EQUITY COURT.

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1. **RAILROADS—PLEDGE OF "NET EARNINGS" ACCRUING TO LESSEE ON ACCOUNT OF BUSINESS COMING "FROM OR OVER" LEASED ROAD.**—Where a railroad company leased the unfinished road-bed and all the rights and franchises of another company for a term of years, and the lessor executed mortgage bonds and placed them in the hands of the lessee with which to raise money to complete the leased road, which was intended by the lessee as a "feeder" for its main line, and the lessee pledged for the payment of the interest on the bonds the "net earnings" which might accrue by reason of business "coming to it from or over" the leased road, the lessee thereby put in lien the net earnings not only on the business coming to the main line directly off the leased road, but also on the business received on the main line, and destined to points on the leased road.
2. **SAME.**—In arriving at the "net earnings" to which bondholders are entitled for the payment of interest on their bonds, there should be deducted from the gross earnings accruing to the lessee from business coming to it on account of the leased road not only the cost and expense of handling this particular business, but a porportionate part of the total operating expenses of the company. But the losses incurred by the lessee in operating the leased road are not to be deducted from the net profits which the lessee made on its own lines from the business coming to it from the leased road, or such net profits are not to be applied to the payment of those losses before paying the interest on the bonds.
3. **INTEREST.**—The earnings as they are ascertained in the approved report of the commissioner should bear interest from the time they

Schmidt, Trustee, v. Louisville & Nashville Railroad Co.

should have been applied under the contract in payment of the interest on the bonds.

SIMRALL & BODLEY FOR APPELLANTS.

1. Our contract is not that we shall have the net earnings of the Louisville, Cincinnati & Lexington Railway Company on business coming to it from or over the Cumberland & Ohio road after it has been thrown into hotch-potch with the business of the Louisville & Nashville Railroad and borne a proportion of the general expenses of the entire system. Neither is it that we shall have what is left of said net earnings after there has been deducted therefrom a certain proportion of *all the expenses and all the losses* which the Louisville, Cincinnati & Lexington Railway Company has incurred *on all its business*. But our contract is for *all the net earnings* which the Louisville, Cincinnati & Lexington Railway Company may make out of this *particular business*, and the additional cost or expense of handling that *particular business*. (Union Pacific Railway Company v. United States, 9 Otto, 420; Cochran & Fulton v. Atherton, 11 Ky. Law Rep.)

The case of Pullan v. C. & C. Air Line R. Co., 5 Biss., 245, explained.

2. We are entitled to the net earnings both ways. The word "coming" does not carry with it necessarily the idea of physical motion, and as here used it does not mean the opposite of going, but it *means arising or accruing* to the Louisville, Cincinnati & Lexington Railway Company by reason of business coming to it from or over the Cumberland & Ohio road. (Shippen v. Izord, 1 S. & R. (Pa.), 224.)
3. The net earnings of the Louisville, Cincinnati & Lexington *on its own lines* can not be applied to pay its losses on the Cumberland & Ohio.

HELM & BRUCE FOR APPELLEE.

1. The lease and mortgage are to be considered as one, and the holder of each of the mortgage bonds was affected with knowledge of all the provisions of the lease which was duly recorded in the proper counties. (Gammon v. Freeman, 31 Me., 243; R. & B. R. Co. v. Crocker, 29 Vt., 240; Pike v. Cook, 3 Bush, 163; Mueller v. Engler, 12 Bush, 441.)
2. The appellee's obligation to the holders of bonds on the Northern Division of the Cumberland & Ohio Railroad Company does not arise until the operating expenses on the Cumberland & Ohio Northern Division are paid.
3. Appellee's obligation to the bondholders only affects the business originated by the Cumberland & Ohio Northern Division, and delivered by it to the appellee—in other words, business going one way.
4. The whole of the business passing between points on the two lines was of a local character, and not through business, and the cost of doing

Schmidt, Trustee, v. Louisville & Nashville Railroad Co.

this business was very much in excess of the average cost of the whole business done on the lines of the appellee, and the report of Mr. Sewell, in which he estimated the cost of doing this business as no greater than the average cost of doing the whole business, is incorrect for that reason.

The court is referred to the following cases on the subject of how net profits are ascertained: *St. John v. The Erie Railroad Co.*, 22 Wall., 138; *Union Pacific R. Co. v. United States*, 99 U. S., 420; *Tapt v. Railroad*, 8 R. I., 810; *Belfast & Moosehead Lake R. Co. v. Belfast*, 23 Am. and Eng. R. Cases, 740; *Bates v. A. R. Co.*, 49 Me., 491; *United States v. Kansas Pacific R. Co.*, 99 U. S., 455; *Pullan v. C. & O. R. Co.*, 5 Biss., U. S. C. C., 237.

5. The receipts of the two roads from business passing over both should be distributed in accordance with the almost universal custom of allowing the short road an arbitrary proportion of the earnings.

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

In 1879, the Northern Division of the Cumberland & Ohio Railroad Company leased to the appellee, the Louisville, Cincinnati & Lexington Railway Company, for the term of thirty years, its unfinished road-bed, rights of way, with improvements and appurtenances, depots and depot grounds, machinery, tools and implements, together with all its property rights and franchises, belonging to or in any way appertaining to its line of railway at the town of Eminence, Kentucky, thence running southwardly through the Counties of Henry, Shelby and Spencer, and terminating at Bloomfield in the County of Nelson.

In this lease, the first-named company agreed to mortgage to the appellee all its property, rights and franchises belonging to or in any way appertaining to its line of railway as described above, to secure the payment of three hundred and fifty bonds of one thousand dollars each with coupons attached, to run for a term of years. The number of these bonds was subsequently reduced to two hundred and fifty. These bonds were to be put in the hands of the appellee to be sold, and the proceeds

Schmidt, Trustee, v. Louisville & Nashville Railroad Co.

applied to the construction of the Cumberland & Ohio Railroad, and if there were any deficiency to complete the road from Shelbyville to Bloomfield, the appellee was to supply it and have a second lien therefor on the road. After such construction, the appellee was to operate the road under the lease for thirty years, and apply the net earnings derived therefrom to the payment of interest on the bonds indicated, and to the creation of a sinking fund for their retirement. To this end, the lessee was to make to the lessor quarterly returns, giving full details of earnings and operating expenses, including the expense of keeping the road-bed in order. Out of the gross earnings was first to be deducted annually the sum of one thousand dollars to be paid to the lessor with which to keep up its organization; and, if the net earnings did not prove sufficient to pay the interest and provide for the sinking fund on the mortgage bonds, then the lessee (appellee)—if all other sources of raising money failed the lessor—was to supply the deficiency as far as might be done by appropriating the net earnings, or so much as might be needed on its own lines, which might accrue by reason of business coming to it from or over the lessor's lines. The construction of the road from Shelbyville to Eminence was abandoned because the appellee had obtained a long lease of the Shelby Branch road which connected with its own lines at Anchorage, thus connecting the contemplated road of the lessor with its own road, and making it a "feeder" therefor. The sale of these bonds depended on the plan adopted for the prompt payment of the interest, and in order that this might be met promptly, the appellee agreed to pay it during the construction of the road, and then, as we have seen, see to

Schmidt, Trustee, v. Louisville & Nashville Railroad Co.

its payment out of the earnings indicated. The appellee at the start contemplated giving an absolute guaranty of the payment of this interest, but upon the advice of its attorney that it had no power to do so, it executed the following mortgage on the earnings pledged in the lease heretofore described:

“That, whereas, by authority of an act of the General Assembly of the Commonwealth of Kentucky, approved the 18th day of March, 1878, the party of the first part has entered into a contract with the Northern Division of the Cumberland & Ohio Railroad Company for the lease, construction and operation of the latter company's line of road from Eminence, in Henry County, Kentucky, through a part of said county, and the Counties of Shelby and Spencer, and into Nelson County, so far as Bloomfield, all in the State of Kentucky: said lease to continue for thirty years upon the terms therein set out, in which it is stipulated by and on behalf of said first party herein, that if the net earnings of said leased premises do not prove sufficient to pay the interest and provide for the sinking fund of three hundred and fifty bonds of one thousand dollars each, bearing interest at the rate of seven per cent per annum, payable half yearly on the first days of June and December, and having twenty years to run from the 2d day of July, 1879, to be issued by said Northern Division of the Cumberland & Ohio Railroad Company; and if all the sources of raising money of said Northern Division of the Cumberland & Ohio Railroad Company fail to provide for said interest and sinking fund, then said first party herein should supply the deficiency so far as the same may be done by appropriating the net earnings, or so much thereof as

Schmidt, Trustee, v. Louisville & Nashville Railroad Co.

may be needed on its own lines, which may accrue to it by reason of business coming to it from or over the said lines of the said Northern Division of the Cumberland & Ohio Railroad Company, and whereas said contract of lease has been fully consummated by action of the stockholders of the first party herein, and it is now desired to carry into effect the said stipulation as to said net earnings.

“Now, in consideration of one dollar cash in hand paid by said second party to said first party, and the premises, the said first party has this day and does hereby mortgage and put in lien all net earnings which may accrue to it by reason of business coming to it from or over said lines of the Northern Division of the Cumberland & Ohio Railroad Company to the said Joshua F. Speed, as trustee aforesaid (who is the trustee for the mortgage made by said Northern Division of the Cumberland & Ohio Railroad Company to secure said three hundred and fifty bonds, of one thousand dollars each), conditioned that if the net earnings of said leased premises do not prove sufficient to pay the interest and provide for the sinking fund of said mortgage bonds, then said first party, if all other sources of raising money of said Northern Division of the Cumberland & Ohio Railroad Company prove insufficient, will supply the deficiency so far as it may be done by appropriating and paying over promptly the net earnings, or so much thereof as may be needed on its own lines, which may accrue by reason of business coming to it from or over said Northern Division of the Cumberland & Ohio Railroad Company's lines for the purpose of discharging said interest and sinking fund as they severally fall due.”

In pursuance of the contract of the lease and mort-

Schmidt, Trustee, v. Louisville & Nashville Railroad Co.

gages, these bonds were placed on the market by the appellee and sold at about their face value. No interest having been paid on them since 1883, the appellant, Schmidt, as successor to the trustee named in the mortgage, and the other appellants who were the purchasers of the bonds, instituted this action to compel the appellee to account for the net earnings alleged to have accrued to it by reason of business coming to it from or over said Northern Division of the Cumberland & Ohio Railroad Company's lines for the purpose of paying the defaulted interest and establishing the promised sinking fund with which to retire the principal at maturity. The appellee denied that it has made any profit from the business coming to it from or over the line of the leased road.

The case was elaborately prepared, and after a number of references to, and reports from, special commissioners—experts in the tabulation of figures—and the accumulation of several thousand pages of record, the chancellor finally dismissed the petition.

The appellants contend that the net earnings made on the lines of the appellee, and put in pledge under the lease and mortgage, were the net earnings of business coming to the appellee *from both directions*—that is to say, earnings accruing by reason of business on its own lines, brought to it on account of the building of the new road. The appellee says that it was the intention to put or pledge only the profits of business coming literally from off the new road on to the main line, and this is the first question to be decided.

In his first opinion, the learned chancellor held that the plaintiffs and other holders of the bonds were entitled to the net earnings of the appellee "on business coming

Schmidt, Trustee, v. Louisville & Nashville Railroad Co.

to it from or over the lines of the Northern Division of Cumberland & Ohio Railroad Company in both directions," and the commissioner was directed to ascertain and report the net earnings accordingly. Again considering the question carefully, the chancellor more than a year after his first opinion, "reached the conclusion that the net earnings pledged embrace such as arise from business carried on over said road both ways—going and coming," but in the opinion and judgment appealed from, he comes to a different conclusion. We are of the opinion that his first impressions are correct. Business coming to it "from" the Northern Division of the Cumberland & Ohio means business coming to it by reason of, out of or by aid of the Northern Division of the Cumberland & Ohio. The new road is the source of the business or the cause of the business. The fact that it has been built brings business from Louisville, Cincinnati and Lexington on to the lines of the appellee and over its own line to Bloomfield and other points on the way. It also brings business on its own line to the main line, and it is by reason of the new road and therefore "from" the new road that the business originates.

This construction is in accord with the spirit of the agreement and the purposes in view.

The trunk line wanted a "feeder"; it was willing to give up temporarily all it might earn by reason of the business—all the business—brought to it by the new road for the sake of having a permanent feeder in the future. It might not pledge its own resources—though willing to do so—to the payment of this interest, but it could give up all it made for the time being out of the business created by the new road.

Schmidt, Trustee, v. Louisville & Nashville Railroad Co.

The second question is how are we to ascertain the net earnings in lien under the mortgage?

The gross earnings are given, but from them what shall be deducted in order to show the net earnings?

The appellants say that the appellee being fully equipped with officers, rolling stock and other appliances for operating its roads, should account for the gross earnings received for doing the business brought to it from the Cumberland & Ohio less the cost and expense of handling *this particular business*. That their contract is not that they should have the net earnings of the Louisville, Cincinnati & Lexington Railway Company on business coming to it from or over the Cumberland & Ohio road after it has been thrown into hotch-potch with the other business of the appellee, and borne a proportion of the general expenses of the entire system. Nor is it that they should have what is left of the net earnings after there has been deducted therefrom a certain proportion of all the expenses and all the losses which the appellee has incurred on all its business. But that their contract is for all the net earnings which the Louisville, Cincinnati & Lexington Railway Company may make out of this particular business, which of necessity is the difference between its gross earnings from that particular business and the additional cost or expense of handling that particular business.

Now granting full effect to all counsel say as to limiting or restricting the deduction to be made from the gross earnings in the way of cost for handling this particular business, we fail to understand how we are to arrive at the cost of handling this business. It can not be meant that each shipment of freight, to the profit of shipping

Schmidt, Trustee, v. Louisville & Nashville Railroad Co.

which the appellants are entitled, is to be traced over the lines of the appellee to its destination, and the cost thereof sought to be ascertained by some special rule not applicable to shipments of other freight. Manifestly, the particular shipments in which the appellants are interested enjoy no special place or retain no privileged classification when they come to be mixed with the other shipments of the main line. Notwithstanding that the contract controls the final destination of the net earnings of this freight and gives it to certain designated persons, nevertheless, in what respect, may we ask, does it cost less to ship a pound of this freight than to ship a pound of any other freight carried over the appellee's lines?

It is said that the appellee would have carried this general freight anyway, and been to the cost of doing so whether it carried this particular freight or not; but this can be said of every pound carried on the train, and besides it is not true that the appellee could have done the business thus coming to it from the Cumberland & Ohio without additional cost. But it is to find this additional cost that we are called on to adopt some just rule.

There is nothing in the mortgage which prescribes the method of ascertaining these net earnings. They are therefore to be arrived at in the usual way. The shipments in question must be subjected to a like cost of transportation as falls on other business. From the gross receipts must be deducted the cost of producing them. The traffic from the Cumberland & Ohio is solicited by the usual methods of advertising, received at the various depots of the main line, sorted, loaded, transported, unloaded and delivered. Counsel admit the existence of some proper charges against this business, otherwise the

Schmidt, Trustee, v. Louisville & Nashville Railroad Co.

appellee would be held for the gross earnings, but how shall we stop short of letting it bear the same proportion of cost as falls on other business? Why, for example, should a proportion of the cost of additional water supply or fuel be charged against this business and not a proportion of the amount paid for labor on the road? Certainly the more business done, the greater tonnage hauled, the more water, fuel, labor, etc., required, and the greater the wear and tear of the road and rolling stock; and we know of no way to arrive at all this save approximately by a proportion distributing the total operating expenses over the whole business. This process has been approved in many cases. (See *St. John v. Erie R. Co.*, 22 Wall., 136; *Pullan v. C. & O. R. Co.*, 5 Biss., U. S. C. C., 237; *United States v. Kansas Pacific R. Co.*, 99 U. S., 455.) In the first-named case it is said: "The business of the road is a unit. If it had been disintegrated, as proposed by the complainant, we apprehend it would have been found that the correlations of the main stem and the branches were such that the expenses and charges incident to the entire business and those of its several parts were so interwoven and blended that an accurate ascertainment of the net profit of the main line and any of the auxiliaries, taken separately from the rest, would have been impracticable."

It appears from the record, that some eight or ten commissioners' reports have been elaborately prepared and filed seeking to ascertain the net earnings in dispute. The first one (R. E. S. No. 1) ignores the equitable method of distributing the cost of the business in question by proportion, as indicated above, and others reach results by using what is called "arbitrariness." Of these we

Schmidt, Trustee, v. Louisville & Nashville Railroad Co.

may say they have no place in this case, by reason of the absence of any agreement to the effect that they may be used. Upon examination of all the reports and the principles underlying them, we are of opinion that the report of Mr. Sewell (R. E. S. No. 2) is a nearer approximation to correct results than any of the others. It estimates the earnings on the appellee's lines in both directions, and finds the net earnings by deducting from the gross receipts the expenses of operating the road by which the receipts are earned. The cost of transportation is ascertained by proportion, and the proper per centage is charged to the business in dispute, all of course, aside from and exclusive of expenditure of capital laid out in constructing and equipping the works themselves. This gives to the appellants the sum of \$60,192.27 of net earnings up to the date of the report named. Other reports reduce this sum, although purporting to be based on the same principles; and it may be admitted, that by the exercise of sufficient ingenuity in multiplying the items of expenses attending such a business as that of railroading, the actual earnings of a road may be made to vanish in a maze of mathematical calculation. In addition to the fact that this report (R. E. S. No. 2) shows itself to be the nearest approach to absolutely correct results, its conclusions are approved by the judgment of Baird, Sewell and others who have devoted years of study to the question at hand.

The chancellor finally reached the conclusion that under the contracts in question the net profits which the appellee made on its own lines from the business coming to it from the Cumberland & Ohio road should be applied, not in payment of the interest on the bonds, but in paying

Schmidt, Trustee, v. Louisville & Nashville Railroad Co.

the losses incurred by the lessee and appellee in operating the leased road. Holding, in other words, that there were no net earnings as long as there was a loss in running the leased road. We think this is manifest error. It was to meet this contemplated loss or deficiency that the contract was made, and in express terms directed the net earnings to be applied to the payment of this interest.

The loss accruing to the appellee in this case, if any, arises not out of the pledge of what it makes on its own lines from the business brought to it from the new road, but out of an unprofitable lease of the new road. The appellee had the power to make this unlucky contract of lease though it might not agree to pay this interest.

The results arrived at by the commissioner in the report R. E. S. No. 2 as the net earnings up to the date fixed in the report, are evidently fair and just to all the parties concerned, and this report is approved.

The judgment is reversed, with directions to take the report indicated herein as the basis for further proceedings consistent with this opinion.

To a petition for rehearing Judge Hazelrigg delivered the following response of the court:

In response to the inquiry as to whether or not the sums to which the bondholders are entitled under the opinion herein should bear interest, and if so, from what time, we are of opinion that, although the amount of the earnings was in dispute and the terms of the contract not altogether free from ambiguity, nevertheless, the sums due were fixed by a written contract, and the time of payment also fixed, and we perceive no reason why the earnings, as they are ascertained in the

Commonwealth v. Barnett. Same v. Hutton.

approved report of the commissioner, should not bear interest from the time they should have been applied under the contract in payment of the interest on the bonds. If the commissioner has computed the earnings from too early a date, it is because the coupons on the bonds for such time had already been paid, and if so, such coupons were taken in by the railway company and will be admitted as credits on final hearing, which meets the suggestion of error in that particular made by counsel for the appellees.

The petition for rehearing is overruled.

CASE 50—INDICTMENT—FEBRUARY 8.

Commonwealth v. Barnett.

Commonwealth v. Hutton.

APPEALS FROM PULASKI CIRCUIT COURT.

OBTAINING MONEY BY FALSE PRETENSES.—Where it was the duty of the "timekeeper" of a railroad company to keep an accurate account of, and report to the company at the end of each month, the number of trips made by each train conductor in the service of the company, and the timekeeper, pursuant to a conspiracy with one of the company's conductors, reported that the latter had, during a particular month, made more trips than he had in fact made, and the company, relying upon that report, paid the conductor a larger amount than he was entitled to receive, the conductor, by reason of his combination and agreement with the timekeeper to defraud the company, was guilty of obtaining money by false pretenses, being as much a principal in the offense as if he had made the false report in person.

WM. J. HENDRICK, ATTORNEY-GENERAL, AND C. W. LESTER, COMMONWEALTH'S ATTORNEY, FOR APPELLANT.

The statute is broad enough to cover, and was intended to cover, the obtention of money or property by any one under or by a false pretense, statement or token, whether he made the pretense, state-

Commonwealth v. Barnett. Same v. Hutton.

ment or token himself or procured it to be made by another; and thus construing the statute, the indictment contains all the material averments necessary to constitute the offense charged. (Criminal Code, secs. 122, 124.)

O. H. WADDLE ON SAME SIDE.

The acts alleged in the indictment are sufficient to constitute the offense of obtaining money under false pretenses. (Bishop on Criminal Law, vol. 2, secs. 442, 470; Am. and Eng. Ency. of Law, vol. 7, pp. 700, 720, 721, 754, and authorities there cited; Roberts v. People, 9 Col., 458; 13 Pac. Law Rep. 630.)

GEORGE DENNY FOR APPELLEES.

While the defendants may be indicted for conspiracy and punished as directed by the common law, they can not, under the facts as alleged in the indictment, be held responsible for obtaining money by false pretenses, as no act or conduct upon their part induced the railroad company to believe that the account for their services as presented by Hyde did, in reality, contain the correct amount of money earned by them.

CHIEF-JUSTICE BENNETT DELIVERED THE OPINION OF THE COURT.

The appellees, Lon Barnett and H. A. Hutton, were indicted in the Pulaski Circuit Court for obtaining money by false statement, pretense or token from the Cincinnati, New Orleans & Texas Pacific Railway Company. It is alleged that the appellees were conductors on the company's freight trains, and that George W. Hyde was in the employment of the said company and engaged as assistant timekeeper for it, whose duty it was to keep an accurate account of the amount of services rendered said company by the appellees, and report to the company, at the end of each month, the number of trips made by the appellees during said month, and the amount of money due them therefor from said company. It is also alleged that the appellees and said Hyde conspired, agreed and confederated, one with another, that said Hyde, as timekeeper, should report to said company more trips at

Commonwealth v. Barnett. Same v. Hutton.

the end of the month than the appellees had made during that month, in order to enable them to get pay for trips that they did not make; and pursuant to said agreement and confederation said Hyde reported to said company more trips than the appellees had made as conductors, the pay for which amounted to several hundred dollars, and that the company relied upon said reports as true and correct, and in pursuance thereof paid said sums to the appellees, who demanded and received the same in pursuance of said false and fraudulent combination and confederation. It is also substantially alleged that the company was induced to pay said sums by said false reports alone.

A demurrer was sustained to these indictments. The language of the statute under which these indictments are drawn is as follows:

"If any person, by any false pretense, statement or token, with the intention to commit a fraud, obtain from another money, property or other thing which may be the subject of larceny, . . . he shall be confined in the penitentiary not less than one nor more than five years." (Gen. Stats., chap. 29, art. 13, sec. 2.)

The facts necessary to constitute this crime are as follows: *First*, That the property, thing or money obtained must be the subject of larceny. The money obtained was clearly the subject of larceny. *Second*, That it was obtained without right and with the intention to commit a fraud. *Third*, That there was a fraud committed by the obtention.

The allegations of the indictment are: That by a fraudulent combination and agreement with the time-keeper he reported more trips than the appellees had made for the company as its conductors; that it was

intended by the appellees and the timekeeper that the report should be received as correct by the company, and to enable the appellees to fraudulently obtain, upon the faith of the report, more money than they were entitled to receive for their services, and that the company did rely upon the report as correct, and paid to the appellees, upon the faith of it, more money than they were entitled to receive.

It seems that if the appellees had made these false representations themselves for the purpose of defrauding the company out of more money than they were entitled to receive for their services, and the company, knowing nothing to the contrary, had paid them the sum claimed upon the faith of the representations thus made, they would be guilty of obtaining the money by false pretenses, etc. But, instead, they conspire with the company's timekeeper—whose duty it was to make the report of the trips made by the appellees, and upon which report the company relied—to make a false report of the number of trips that they made in order that they might receive more money than they had earned, and pursuant to the conspiracy the false report was made, and the appellees were thereby enabled to defraud the company out of money not due them.

Now, it seems to us that this combination and agreement made the appellees as much a principal and as much guilty of obtaining the money by false pretenses as if they had acted all the parts in person. The indictment in each case is clearly sufficient.

The judgment sustaining the demurrer is reversed, and each case is remanded for further proceedings consistent with this opinion.

Blankenship, &c., v. Ross.

CASE 51—PETITION EQUITY—FEBRUARY 10.

Blankenship, &c., v. Ross.

APPEAL FROM LAWRENCE CIRCUIT COURT.

A BASTARD IS NOT CAPABLE OF INHERITING FROM OR TRANSMITTING AN INHERITANCE TO A LEGITIMATE CHILD OF HIS REPUTED FATHER. Therefore, upon the death without issue of one of two bastard brothers born of the same mother, his real estate passed by inheritance to his mother and bastard brother to the exclusion of a legitimate son of his reputed father. And the fact that his estate came to him by devise from his reputed father, and that he was an infant at the time of his death, can make no difference, as section 9 of chapter 31 of the General Statutes, which provides that upon the death of an infant without issue, his real estate derived by gift, devise or descent from one of his parents "shall descend to that parent and his or her kindred." applies alone to infants born in lawful wedlock.

W. W. MARCUM AND STEWART & STEWART FOR APPELLANTS.

The word "parent," as used in section 9 of chapter 31, General Statutes, does not include the putative father of an illegitimate child. (Gen. Stats., chap. 31, secs. 1, 5; *Stevenson's Heirs v. Sullivan*, 5 Wheaton, 207; *Sutton, &c., v. Sutton, &c.*, 87 Ky., 216; *Berry v. Owens' Heirs*, 5 Bush, 452; *Remington v. Lewis*, 8 B. M., 606; *Scroggin v. Allan*, 2 Dana, 363; *Blackstone's Comm.*, book 2 *, page 274; *Bouvier's Law Dictionary*, "Parent.")

ALEXANDER LACKEY FOR APPELLEE.

Where a bastard dies in infancy without issue, estate which he has derived by gift or devise from his father passes to the heirs of the father to the exclusion of the heirs of the bastard. (Note to *In re Ingram*, 12 Am. St. Rep., 103.)

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

The third clause of the will of John H. Ross is as follows: "All the residue of my estate, of every kind and description whatever, I give to my son, Thomas Granville Ross, and to my sons, Charley Brewster and John M. Ross, known as Blankenship, sons of Sarah A. Blankenship."

As may be readily inferred from the words there used,

Blankenship, &c., v. Ross.

and otherwise appears, the two last-named devisees were born bastards. And one of them, John M. Ross, having, after the will was recorded, died an infant, intestate and without issue, the question on this appeal is whether the real estate thus devised to him goes to his mother and bastard brother, or, as was adjudged by the lower court, to Thomas Granville Ross, the only legitimate child of the testator.

Section 5, chapter 31, General Statutes, is as follows: "Bastards shall be capable of inheriting and transmitting an inheritance on the part of or to the mother; and bastards of the same mother shall be capable of inheriting and transmitting an inheritance on the part of each other, as if such bastards were born in lawful wedlock of the same parents."

According to the plain meaning of that section and uniform decisions of this court, Sarah A. Blankenship, mother, and Charley Brewster Ross, brother, take the real estate in question to the exclusion of Thomas Granville Ross and all others. For, as said in *Remington v. Lewis*, 8 B. M., 606, in reference to the act of 1840, similar to section 5, "it must be limited by its own terms to the establishing right of the mother to inherit from her illegitimate child, and the right of her illegitimate children to inherit from her and from each other; and that it does not operate to establish a right, either in the illegitimate children to inherit from the legitimate, or in the legitimate children to inherit from the illegitimate." If, then, as has been also held, the statute is to be so confined in its operation as that a bastard can not inherit from collateral kindred, or even ancestor of his mother, or from a brother born in lawful wedlock of the same mother, nor

any one of either of those classes can inherit from him, certainly a reputed brother of a bastard by the same father can neither inherit from or transmit an inheritance to him.

The lower court does not, however, seem to have wholly ignored such construction of that section, but bases its judgment, as therein stated, upon supposed application to cases like this of section 9 as follows: "If an infant dies without issue, having title to real estate devised by gift, devise or descent, from one of his parents, the whole shall descend to that parent, and his or her kindred as hereinbefore directed, if there be any; and if none, then in like manner to the other parent, or his or her kindred," etc.

But that section was adopted in reference to the common law rule of descents and distribution. Consequently, the word "parent" as therein used must be understood a legal parent, as the word "infant" was intended to apply alone to a person born in lawful wedlock. For in contemplation of the common law bastards, being *nullius filii*, have no parent, and are incapable of inheriting or transmitting an inheritance to any person except to their immediate issue.

On the other hand section 5, to the extent it makes a bastard capable of inheriting from, and transmitting an inheritance to, his mother and bastard brothers of the same mother, is in derogation of the common law and was intended as an exception to the rule fixed in section 9 and to be unaffected thereby. So that real estate which an infant bastard may derive from his reputed father by gift or devise (he can not acquire any by descent), is no more subject at his death to operation of section 9 than if such

National Exchange Bank of Lexington v. Wilgus' Ex'ors.

real estate had been given or devised to a stranger in blood to the donor or deviser. But this question need not be further considered, for in *Stover v. Boswell, &c.*, 3 Dana, 233, it was practically settled. There it was said of section 5, act of 1796, similar to section 9 quoted, that it was applicable only in those cases where the infant had living at his death brothers or sisters, or brothers or sisters of the father or mother, as the case may be, or any lineal descendants of either of them who were *capable of inheriting* from said infant.

Here, neither Thomas Granville Roßs, nor any lineal descendant of him, could have, in any event, inherited from the infant bastard, and, as a consequence, section 9 does not nor was intended to apply to a case like this.

Wherefore the judgment is reversed and cause remanded for proceedings consistent with this opinion.

CASE 52—PETITION EQUITY—FEBRUARY 13.

National Exchange Bank of Lexington v.
Wilgus' Ex'ors.

APPEAL FROM FAYETTE CIRCUIT COURT.

WHERE THE NAMES OF TWO OF THREE PARTNERS WERE, BY THE REQUEST OF THE THIRD PARTNER, SIGNED TO A NOTE for money borrowed to be used, and which was used, for partnership purposes, the names signed must be regarded as the firm name for that particular transaction, and the firm is bound on the note just as if the usual firm name had been signed. And renewals signed in the same way also bind the firm. And while such a renewal, after the death of the third partner, did not bind him, yet as there was no intention to release him from the payment of the original note, and it was canceled through inadvertence, he remained bound thereon.

National Exchange Bank of Lexington v. Wilgus' Ex'ors.

WM. LINDSAY FOR APPELLANT.

While a note signed by another than the firm name does not *prima facie* bind the firm, yet where the partners authorize or direct a note to be signed by some other than the regular firm name, given for money or property received for and used by the firm, that note binds the firm and every member of it. (Macklin v. Crutcher, 6 Bush, 408; Carter v. Mitchell, 94 Ky.)

J. H. BEAUCHAMP ON SAME SIDE.

1. This case comes directly within the rule established in Hikes v. Crawford, &c., 4 Bush, 19, and Smith v. Turner's Adm'r, 9 Bush, 417, and in the recent case of Carter v. Mitchell, Assignee, 94 Ky., in which the two first-named cases are reviewed with the case of Macklin v. Crutcher, 6 Bush, 402.
2. Even if a renewal should destroy the obligatory power of the note, the bank is entitled to a recovery upon the principle settled in Turnbow v. Broach, 12 Bush, 456.

R. A. THORNTON FOR APPELLEES.

1. While parol evidence is admissible to charge a dormant or silent partner, whose name is undisclosed by the contract, it is not admissible to charge an ostensible partner, known by the payee of the note to be such, upon a note made by a copartner in his individual name, and accepted by the payee as the individual note of the maker, as was the case with the notes in question in the case at bar. (Macklin's Ex'or v. Crutcher, 6 Bush, 404; 1 Randolph on Commercial Paper, sec. 147; Bedford Commercial Ins. Co. v. Corell, 8 Met. (Mass.), 442; Daniel on Negotiable Inst., vol. 1, sec. 303, third ed.; 1 Lindley on Partnership, p. 340; Holmes v. Burton, 9 Vt., 252; s. c., 31 Am. Dec., 621, Shiffkin v. Walker, 3 Camp., 308; Murray v. Somerville, 2 Camp., 99, note; Kirk v. Burton, 9 M. & W., 284; Scott & Thatcher v. Colmesnil, 7 J. J. Mar., 416.)

Cases commented on: Hikes v. Crawford & Long, 4 Bush, 19; Carter v. Mitchell, Assignee, 94 Ky.; Smith v. Turner's Adm'r, 9 Bush, 417.

2. The mere use, by a firm, of money advanced upon the individual security of one partner does not render the firm liable. (Macklin's Ex'or v. Crutcher, 6 Bush, 404; Holmes v. Burton, 9 Vt., 252; Emily v. Lye, 15 East, 11; Bevan v. Lewis, 1 Sim., 376; Clay v. Cantrill, 18 Pa. St., 413; North Penn. Coal Co.'s Appeal, 45 Pa. St., 181.)

L. W. ROBERTSON ON SAME SIDE.

Where a partner borrows money in his own name and gives his individual note for it, the other partners are not bound on the note, although it was made for the benefit of the firm, and the firm received the use of

National Exchange Bank of Lexington v. Wilgus' Ex'ors.

the money. In order to bind a partner on a note, it must be executed by himself or in the firm name. (Story on Partnership, 134, 135, 136; North Penn. Coal Co.'s Appeal, 84 Am. Dec., 487; Holmes v. Burton, 31 Am. Dec., 621; 2 Lawson's Rights and Remedies, secs. 645, 676; Macklin v. Crutcher, 6 Bush, 401; Montague v. Reakert, 6 Bush, 393; Galliot v. Planters, &c., Bank, 36 Am. Dec., 256; 1 Lindley on Partnership, star page 189, chap. 1, sec. 6.

CHIEF JUSTICE BENNETT DELIVERED THE OPINION OF THE COURT.

J. B. Wilgus and W. E. and E. K. Cropper composed a firm of partners engaged in the tobacco business in the city of Lexington, Ky., under the firm name of Cropper & Co. During the existence of the firm, W. E. and E. K. Cropper signed their names to six promissory notes to the appellant for money loaned for the use of the firm, and which was used by the firm in its business. J. B. Wilgus having died, and the firm having become insolvent, and the notes not having been paid, the appellant presented the notes to the estate of J. B. Wilgus for payment. The representatives of said estate refused payment of the notes upon the ground that, as they were signed by W. E. and E. K. Cropper in their individual names, and not in the firm name of Cropper & Co., J. B. Wilgus, a member of the firm, was not bound for the payment of the notes, nor upon an implied assumpsit for the money so loaned.

It appears, without contradiction, that J. B. Wilgus at the time of the loans was a director in the appellant; that he told the appellant that his firm needed the loan of some money, and requested the appellant to let the firm have it. But, inasmuch as he was one of the directors of the appellant, he did not wish his name to appear on the paper, and for that reason to let the paper appear in the names W. E. and E. K. Cropper; that the money was loaned to the firm for its use, and the notes taken under

said arrangement. Also that the money was used by the firm with the knowledge and consent of Wilgus; and that he afterward recognized the firm's liability for the payment of the notes.

The question is, when a note is signed by one partner in his individual name, which is not the firm's usual name, for borrowed money to be used for the benefit of the firm, and at the request and consent of the other partner, is the partnership bound on the note for its payment? As this court has settled that question to its own satisfaction, it is needless to go outside to look for precedent.

In the case of *Carter v. Mitchell*, 94 Ky., 261, the cases by this court upon the question at issue are reviewed and a rule established which governs this case.

It is held in that case that the doctrine announced in the case of *Hikes v. Crawford & Long*, 4 Bush, 19, to the effect that when a note had been executed for borrowed money by one member of the firm in his own name, and which was not the firm's name, and the money was used for the benefit of the firm, the firm was liable on the note for its payment, was no longer the law in this State. It was also held in that case that when a note was executed by one member of a firm in his individual name, which was not the firm's name, for the benefit of the firm, by the consent of the other member, such consent made the note the firm's note, and it was bound for its payment. It seems in such case that the consent of the member not signing that the other member may sign the note for the benefit of the firm, is equivalent to making that member's name the firm's name for that particular transaction, and the case of *Macklin's Ex'or v. Crutcher*, 6 Bush, 401, is construed to be in harmony with this view. It is clear that

National Exchange Bank of Lexington v. Wilgus' Ex'ors.

the money was loaned by the appellant to W. E. and E. K. Cropper, in their individual names, and not in the firm's name, but for its benefit, at the request of J. B. Wilgus, and the firm did get the benefit of it.

These facts certainly made the notes firm notes and bound Wilgus for their payment. But it is said that Wilgus refused to sign the notes, which shows that he did not intend to be bound thereon, and that the bank so understood it. But we think the facts relative to that matter are in favor of his liability on the notes, because he asked the bank to loan the money to W. E. and E. K. Cropper for the benefit of the firm, and gave as his reason for not getting the money in the name of Cropper & Co., that, being a director in the bank he did not wish to appear as obligor on the notes. This fact, we think, emphasizes the conclusion reached that Wilgus authorized the use of the names W. E. and E. K. Cropper as representing the firm's name. Also, the fact that the firm's tobacco was pledged to secure the payment of the notes with the knowledge and consent of Wilgus, is another fact showing that he intended said names to represent that of the firm. Some of said notes were renewed in the lifetime of Wilgus, in the name of the same payors. This fact does not militate in favor of Wilgus, because as the names of the Croppers were intended to represent the name of the firm in the matter of borrowing money from the bank, the renewals of the notes were only evidences of the same transaction, and bound Wilgus for their payment. Conceding that the Croppers had no right to renew one of the notes after the death of Wilgus, the bank did not release Wilgus from the payment of the original note which he was bound on unless the bank had intended to

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Vertrees' Adm'r v. Newport News, &c., Co.

release him; but the bank says, and proves it, that it never intended to release Wilgus from the payment of the original note, and that the cancellation of the same was an inadvertence. According to this, he remained bound on the same until the renewal was paid or satisfied.

The judgment is reversed and the case is remanded, with directions to give appellant judgment on the notes sued on, except the one executed after the death of Wilgus, and to render judgment in that case on the original note against Wilgus' representatives.

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CASE 53—PETITION ORDINARY—FEBRUARY 13.

Vertrees' Adm'r v. Newport News, &c., Co.

APPEAL FROM HARDIN CIRCUIT COURT.

1. **RIGHT OF PLAINTIFF TO DISMISS WITHOUT PREJUDICE**—After the court has sustained a motion by defendant for a peremptory instruction to the jury, but before such an instruction has been given, the plaintiff has a right to dismiss his action without prejudice, as there has been at that time no "final submission" of the case to the jury, within the meaning of subsection 1 of section 371 of the Civil Code.
2. **RAILROADS—DUTY TO TRESPASSERS**.—Where a boy ten years of age, in attempting to get upon a slowly moving engine in the private yard of a railroad company, fell upon the track, and being run over, was killed, the boy being a trespasser, the servants of the company were not required to anticipate his presence, and there being nothing to show that the engineer discovered his peril in time to avoid running the engine over him, the company is not responsible for his death.

H. T. KENDALL FOR APPELLANT.

1. At the time of plaintiff's motion to dismiss without prejudice there had not been a final submission of the case within the meaning of subsection 1 of section 371 of the Civil Code, and the court erred in overruling the motion.

Vertrees' Adm'r v. Newport News, &c., Co.

- 2 Citations on the subject of peremptory instructions: Reed v. Bragg, 5 J. J. M., 620; Merritt v. Pollus, 16 B. M., 856; Jarman v. Howard, 3 Mar., 384; McPherson v. Hickmans, 1 Mon., 170; Rowland v. Hanna, 2 B. M., 129; Easely v. Easely, 18 B. M., 93; Trotter v. Sanders, 7 J. J. M., 321; Slaughter v. Morgan, 1 Met., 29; Stephens v. Brooks, 2 Bush, 138; Fightmaster v. Beasley, 7 J. J. M., 411.
3. Citations on the subject of willful negligence: L. & P. Canal Co. v. Murphy, 9 Bush, 525; Lexington v. Lewis, 10 Bush, 679; Louisville, &c., R. Co. v. Case, 9 Bush, 735; Lou. & Nash. R. Co. v. Collins, 2 Duv., 116; Lou. & Nash. R. Co. v. Sickings, 5 Bush, 4; L. & N. R. Co. v. Filburn, 6 Bush, 575; Louisville, &c., R. Co. v. Mahoney, 7 Bush, 239; P. & M. R. Co. v. Hoehl, 12 Bush, 43; Jacob v. Lou. & Nash. R. Co., 10 Bush, 267.

W. S. CHELF AND P. H. DARBY FOR APPELLEE.

1. The peremptory instruction was proper. There was not a scintilla of evidence to show negligence on the part of any of defendant's servants.
2. Plaintiff's motion to dismiss without prejudice came too late. (Civil Code, sec. 371, subsec. 1; Begley v. Duff, 7 Ky. Law Rep., 376.)

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

On trial of this action by a personal representative to recover damages for destruction of life by alleged willful neglect, the following proceeding occurred at conclusion of plaintiff's evidence: "Defendant moved the court to instruct the jury peremptorily to find for defendant, which motion was fully heard by the court and sustained, to which the plaintiff excepted. And then moved the court to allow plaintiff to dismiss his cause of action without prejudice to a future trial, which motion was overruled. And the jury was instructed to find for defendant, to which plaintiff objected and excepted at the time." Thereupon a verdict was, in pursuance of the instruction, rendered for defendant, followed by judgment, from which plaintiff prosecutes this appeal. The first question naturally arising in this case is, whether the court properly sustained defendant's motion for a peremptory instruction. For, if not, the judgment will have to be reversed

Vertrees' Adm'r v. Newport News, &c., Co.

for new trial of the present action if demanded by plaintiff, irrespective of the question of his right to dismiss the action without prejudice.

Plaintiff's intestate was a boy about ten years of age, and was killed in the following manner: The engineer had just made what is called a running switch, whereby two freight cars were detached from the train and placed upon a side track. And the engine and tender were moving back slowly upon the main track to reach other cars of the train that had been left upon the main track beyond junction with the side track, when deceased, of his accord, ran from the depot, passing across a pond of water frozen over, to the locomotive and tender, and passing around the latter, attempted to get upon break-beam of the engine, but slipped or made a misstep, and falling upon the track and being run on was killed.

The place was within the private yard of defendant, where deceased had no right to go, and defendant's servants were not required to anticipate or look out for his presence. So, deceased being at the time a trespasser, and his conduct, under the circumstances, extremely incautious and reckless, there would be no ground whatever for holding defendant responsible for his death, unless it be made to appear that the engineer discovered his peril in time to avoid running the engine and tender on him. But there is no evidence before us tending to establish that fact, or negligence of any kind or degree on part of those in charge of the engine and tender. Consequently, as the record now stands, the lower court was in our opinion bound to give the peremptory instruction. Whether it was error to overrule plaintiff's motion to dismiss the action without prejudice, notwithstanding failure to make

out his cause of action, depends upon meaning of subsection 1, section 371, Civil Code, which provides that an action, or any cause of action, may be dismissed, without prejudice to a future action, "by the plaintiff before final submission of the case to the jury, or to the court, if the trial be by the court."

This was a right that existed at common law, and it would, in many cases, be extremely oppressive and prejudicial to deny it. And it does not seem to us at all difficult to determine what is meant by the words, "before the final submission of the case to the jury," as used in the section referred to.

The Civil Code provides for and makes a distinction between a trial by a jury and trial by the court of an action ordinary, the latter being permitted by consent of parties to try an action even sounding in damages. But as defined by section 311, "A trial is a judicial examination of the issue of law or of fact in an action or proceeding." The issue in this case was one of fact, to be judicially examined and determined by the jury, under instructions by the court, in regard to the law applicable. Now the bill of exceptions, which we have quoted, shows that, although the court had sustained plaintiff's motion for the peremptory instruction, there had not been any submission of the case, final or otherwise, to the jury before plaintiff moved to dismiss the case, for it is stated that the jury was not actually instructed to find for defendant until after the motion of plaintiff to dismiss was made. Strictly and properly there can be no *final* submission of a case to the jury until all questions of law have been disposed of by the court, instructions and papers pertaining to the case have been actually delivered to the jury,

Parrish, &c., v. Ross.

and they are authorized, without further interposition or control of the court, to proceed to a judicial examination of the issue of fact submitted to them.

In our opinion plaintiff had the right to dismiss his action without prejudice at the time he made the motion, and the court erred in overruling it.

Wherefore, the judgment is reversed and cause remanded, that the motion may be sustained.

CASE 54—PETITION EQUITY—FEBRUARY 15.

Parrish, &c., v. Ross.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

1. **POWER OF LOWER COURT OVER CASE PENDING APPEAL—RIGHT TO EXECUTION ON RENT BOND.**—Pending an appeal with supersedeas from a judgment dismissing a petition by which the plaintiff claimed a life interest in an undivided third of a tract of land, the court, having retained the case on the docket for the purpose of making all necessary orders as to the division of the land between the defendants, had the power to divide the land and to rent out the one-third claimed by plaintiff, which was not allotted to either of the defendants; and the commissioner having rented out that part of the land under order of the court and the defendants having become the renters and executed their bonds for the rent, the court, upon the reversal of the judgment dismissing plaintiff's petition and the entry of a judgment allotting him the one-third of the land which had been rented pending the appeal, properly ordered executions to issue against defendants upon the rent bonds.
2. **SAME.**—Even if the court had no control, pending the appeal, over the one-third of the land claimed by plaintiff, yet the plaintiff, having ratified the action of the court in renting out the land, is entitled to recover on the bonds voluntarily executed by defendants for the rent of land which did not belong to them, but to plaintiff.

H. L. STONE FOR APPELLANTS.

The orders appealed from should be reversed, because the court below had no power or jurisdiction to rent out the land in controversy after

Parrish, &c., v. Ross.

its final judgment dismissing Ross' petition, or to require the appellants, either as principal or sureties, to execute bonds for the rent of lot No. 2, in which Ross claimed a life estate, nor to appoint a receiver to collect said rent bonds by execution or otherwise. (Ross v. Parrish, 18 Ky. Law Rep., 858.)

W. H. HOLT FOR APPELLEE.

If Mrs. Brawner had been in possession under the judgment she would have still been liable to appellee for rent by virtue of the final decision of the case, and there is nothing in the record showing she became bound for an unreasonable rent because of the public renting, or that appellee, by his bidding, compelled it. The renting from first to last was acquiesced in, and recognized as necessary for the protection of the party who might finally succeed.

W. A. SUDDUTH ON SAME SIDE.

As it is not contended that the judgment renting the land was void, but that it was erroneous merely, and it has never been appealed from, appellants can not now resist the collection of the rent bonds.

CHIEF JUSTICE BENNETT DELIVERED THE OPINION OF THE COURT.

The appellee, John W. Ross, in 1886, sued to recover for life one undivided third of about four hundred and thirty-eight acres of land. The appellants, John S. Parrish and Mrs. Cordie E. Brawner, also claimed one third each in said tract of land for life, and Mrs. Brawner also claimed absolutely the part that the appellee claimed. Upon final trial the court adjudged Mrs. Brawner and John S. Parrish one third interest each for life in said tract of land, but denied the appellee's right to the other third interest therein. The appellee appealed from the decision of the circuit judge denying him a life estate in a third of said land, and suspended the judgment by supersedeas bond. The case was reversed, and the appellee, Ross, was allowed one-third life interest in said land, and judgment was entered in the lower court in accordance with the opinion of this court. Upon the rendition of the judgment denying the appellee any

Parrish, &c., v. Ross.

interest in the land, the court continued the case on the docket as between John S. Parrish and Mrs. Brawner for "any necessary orders between them relative to the division of said land." The land, pursuant to the judgment, was divided into three equal parts, and Mrs. Brawner and John S. Parrish were allotted a third each, and the other third which the appellee claimed was not adjudged to either of the appellants, because neither had any right to it, but the court retained control of it during the pendency of the appeal, and ordered the same rented out. Deeds were made to Mrs. Brawner and John S. Parrish to their respective thirds. They abided the judgment of the circuit court, and never thereafter set up any claim to the other third of said land. The court, after the rendition of the judgment settling the right of Mrs. Brawner and Parrish to one-third each of said land, and denying to them or either of them any right to the other third, ordered said third to be rented out by its commissioner, and that bonds be taken for the rent, etc. The commissioner did rent said third out, and the appellants, one or the other, were renters from year to year, and executed bonds for each year's rent. Executions were ordered upon these bonds. From the orders of renting and the order directing executions to issue on the rent bonds the appellants appeal. The appeal is prosecuted upon the ground that the appellee's petition having been dismissed absolutely, and the case having been kept on the docket for orders as between the appellants in reference to the division of said land, that court had no jurisdiction to rent the third not allotted to either of the appellants. It is to be observed that the court, by order, kept the case on the docket for the purpose of taking all

necessary orders in reference to the division of the land between the appellants; also the appellee superseded the judgment dismissing his petition, which kept the case on the docket in reference to him; also, that there was no order disposing of the one-third of the land not allotted to either of the appellants, but the court retained control of the same. Now, in view of these facts, we fail to understand how it is that the court lost control of, and the power to rent out, this third of the land during the pendency of the appeal to this court, when it expressly retained it and no one claimed it. But, independently of all this, we have this plain, honest and business transaction: There is one-third of the land that belongs to the appellee; the appellants have neither right nor claim of right to it, but it belongs to the appellee; the court, on behalf of the appellee, rents it to the appellants; the renting is a voluntary action on their part; they have simply rented land that did not belong to them but to the appellee, and he comes forward and says to the court that he accepts and ratifies its action and is willing to accept the rents. Now by what principle of fair dealing can the appellants say that the court had no power to rent them the land, and therefore the appellee must sue them for the rent and recover it that way. It seems to us that the power of the court may be left out of view, and the case may be put upon the principle of an unauthorized agent renting the land of the appellee to the appellants, and the appellee comes forward and says that he ratifies the act of renting and claims the rent bond. Now is there any court in this country that would deny the appellee the right to recover on the rent bond? We think not. Besides, suppose the order renting the

Smith v. Commonwealth.

appellee's land was erroneous, how can that fact hurt the appellants? They voluntarily rented the land; there was no compulsion resting on them; there was no interest to protect by renting under an erroneous order. The only person that could be affected by the erroneous order was the appellee, and he comes into court and submits to its action, and asks the court to enforce its order, and the court did enforce it, which is affirmed.

CASE 55 —INDICTMENT—FEBRUARY 17.

Smith v. Commonwealth.

APPEAL FROM BELL CIRCUIT COURT.

Where an indictment found in the Perry Circuit Court was, upon motion by the Commonwealth for a change of venue, transferred from that court to the Clark Circuit Court, the jurisdiction of the Perry Circuit Court over the subject matter was thereby divested, and a subsequent indictment found in that court against defendant for the same offense and all proceedings under it were void, the case never having been remanded from the Clark Circuit Court; and this is true, although at the time of the trial under the second indictment, the indictment in the Clark Circuit Court had been filed away with leave to redocket, as that court may yet redocket the case and proceed to try the defendant.

J. M. UNTHANK AND WARREN MONTFORT FOR APPELLANT.

1. The act of May 26, 1890, providing for a change of venue by the Commonwealth, is not unconstitutional. (Com. v. Davidson, 12 Ky. Law Rep., 767.)
2. The Perry Circuit Court divested itself of jurisdiction by the change of venue to the Clark Circuit Court, and could not again acquire jurisdiction except by the case being remanded to it by that court, which was never done. (Hourigan v. Com., 15 Ky. Law Rep., 265.)

W. J. HENDRICK, ATTORNEY-GENERAL, FOR APPELLEE.

This is one of the cases where it is to the interest of the Commonwealth that the law be vindicated by a reversal. The jurisdiction has always

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Smith v. Commonwealth.

been in the Clark Circuit Court since the change of venue to that court.

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

On this appeal from a judgment of the Bell Circuit Court consigning the appellant to the penitentiary for life for the murder of John McKnight in Perry County, the following facts appear from the record, upon which the jurisdiction of the trial court is denied :

On August 25, 1890, the appellant, with a number of others, was indicted for the murder of John McKnight, in the Perry Circuit Court, and thereupon the attorney for the Commonwealth, under the provisions of an act of the General Assembly, approved May 26, 1890, giving the Commonwealth the right to change the venue of a case when there existed a state of lawlessness on the part of the friends and sympathizers of the accused, preventing a fair trial, filed his written statement, and the cause was transferred to the Clark Circuit Court. Thereafter the defendant in that indictment, the present appellant, appeared in the Clark Court and executed bond for his appearance there, as required by law.

The regularity of this transfer, and the constitutionality of the act under which it was made, were determined by this court in the case of *Commonwealth v. Davidson*, 91 Ky., 162, the appellee in that case, Davidson, being one of the defendants in the indictment with the present appellant.

On March 17, 1893, and while the former indictment was still pending and undetermined in the Clark Circuit Court, the grand jury of Perry County again indicted the appellant, Smith, for the murder of John McKnight, and notwithstanding his protest against the jurisdiction

of the court, made by demurrer, plea of former jeopardy, and his affidavit and the record showing that the Perry Circuit Court had been divested of its jurisdiction over the case by the transfer mentioned, the court was about to proceed to a trial of the case when the appellant procured, by proper steps under the statute, a change of venue to the Bell Circuit Court. In the latter court the same questions were again raised as to the jurisdiction of the court, and the foregoing facts were shown by copies of the records from the Perry and Clark Circuit Courts. The court refused to set aside the indictment, overruled the demurrer, general and special, and the objections of the appellant to the jurisdiction, etc., and the case proceeded to trial under the protest of the appellant, who pleaded former jeopardy and set forth the foregoing facts; and on the trial the evidence of the former indictment for the same offense, and the pendency of the same case in Clark, etc., were shown, and the court was asked to instruct the jury to find the defendant not guilty. The court overruled his motions and plea and instructed the jury that, if they believed from the evidence that the defendant had theretofore been acquitted of the offense charged in the indictment by a judgment of the Clark Circuit Court, and if they further believed from the evidence that said court had jurisdiction of his person and of the offense charged in the indictment, then they should acquit the defendant. And further, that it was admitted by the Commonwealth, and must be taken as true, that the defendant was the same person who was indicted in the Perry Circuit Court at its August term, 1890, for the murder of John McKnight, and who was then being tried for the murder of the same John McKnight, and that

Smith v. Commonwealth.

both indictments charged the same offense. The court also gave the usual instructions as to murder, manslaughter, etc.

It appears from the copy of an order of the Clark Circuit Court, filed by the appellant on his motions in this case, and as evidence on the trial, that the Commonwealth's attorney, in the judicial district embracing Clark County, had filed a written statement on October 4, 1893, upon which the court ordered that the indictment against the defendant Smith—the present appellant—he filed away, with leave to redocket the same upon motion of the Commonwealth's attorney.

It is apparent that the finding of the second indictment, while the first one remained undisposed of, and all the proceedings thereafter had on it, are quite out of the ordinary.

It is clear that by its transfer of the case to the Clark Circuit Court the Perry Circuit Court lost all jurisdiction over the subject-matter of the indictment. The proceedings, therefore, thereafter had on the second indictment were void for want of jurisdiction in the court in which they were had, and this is true of the attempted trial in the Bell Circuit Court.

On motion of the defendant in the Clark Circuit Court, the Commonwealth not objecting, the venue might have been changed back to Perry, as decided in *Horigan v. Commonwealth*, 94 Ky., 520, but not otherwise. The so-called trial in Bell was, in legal contemplation, no trial at all, and the same would have been true of every attempted trial in Perry on this second indictment. The Clark Circuit had, at the finding of this second indictment, and at the time of the trial in Bell,

Kirkpatrick v. Commonwealth.

full and complete jurisdiction of the case, and upon redocketing it might yet proceed to try the appellant for the murder of John McKnight.

These principles are fundamental and elementary. It is but just to say that the learned Attorney-General, who, while quick enough always zealously to prosecute the just pleas of the State, yet concedes this case to be one "where it is to the interest of the Commonwealth that the law be vindicated by a reversal."

The judgment is therefore reversed, with directions to quash the indictment and discharge the appellant.

CASE 56—INDICTMENTS—FEBRUARY 20.

Kirkpatrick v. Commonwealth.

Williams v. Commonwealth.

Green v. Commonwealth.

APPEALS FROM HARDIN CIRCUIT COURT.

1. **REPEAL OF STATUTE—LOCAL OPTION.**—An act approved May 5, 1884, making it unlawful to sell liquor in Hardin County, which took effect upon its ratification by the voters of the county at an election held for that purpose, as provided by the act, was not repealed by an act approved March 15, 1890, entitled "An act resubmitting to the voters of Hardin County the question as to whether or not spirituous, vinous or malt liquors shall be sold in said county," the latter act, which provided for a vote by magisterial districts, being intended merely as an amendment to the act of May 5, 1884, it being manifest that it was the intention that the act of 1884 should continue in force, except in such districts as might under the act of March 15, 1890, vote in favor of the sale of liquor. But even if that intention did not appear from the act itself, an act passed May 22, 1890, and at the same session, expressly amending the act of 1884, is sufficient to show that the Legislature did not by the act of March, 1890, intend to repeal the act of 1884.

Kirkpatrick v. Commonwealth.

2. **RE-ENACTMENT OF STATUTE.**—Even if the act of 1884 was repealed by the act of March, 1890, as the act of May 22, 1890, shows that it was the intention to amend it merely, the court will, in order to effectuate that intention so clearly expressed, treat the act of May 22, 1890, as re-enacting the act of 1884.

W. R. HAYNES FOR APPELLANTS.

Brief not in record.

W. J. HENDRICK, ATTORNEY-GENERAL, AND J. S. SPRIGG FOR APPELLEE.

The act of May 5, 1884 (Acts 1884, vol. 2, p. 901), was not repealed by the act of March 15, 1890. (Acts 1889-90, vol. 1, p. 696.)

CHIEF JUSTICE BENNETT DELIVERED THE OPINION OF THE COURT.

These three cases involve the same question and will be considered together. The appellants, as druggists, were indicted and fined for selling whisky in violation of the local option law for Hardin County, Ky., which was enacted on May 5, 1884. The appellants contend that the law of May 5, 1884, was repealed by the act of March 15, 1890. If it be true that the act of March 15, 1890, repealed the act of May 5, 1884, and that the act of 1884 was not re-enacted, then the cases ought to be reversed; if not, they must be affirmed.

On May 5, 1884, the Legislature passed an act authorizing Hardin County, by vote, to prohibit the sale of whisky in the county. Pursuant to the authority given, the county, by vote, did prohibit the sale of whisky within its boundary. The act also prescribed a penalty for violating its provisions of not less than one hundred nor more than five hundred dollars. The appellants were fined for violating this law. The question is, did the act of March 15, 1890, repeal this act? The title of the act of March 15, 1890, is as follows: "An act resubmitting to the voters of Hardin County the question as to whether or not spirituous . . . liquors shall be sold in said county."

Kirkpatrick v. Commonwealth.

The act then provides that the vote upon the question shall be taken by magisterial districts, and upon any magisterial district voting against prohibition, the county judge of the court shall issue a license to applicants to sell whisky in the district upon their complying with the State law in that regard. It also provides that in the districts voting prohibition the county judge shall not grant a license to sell whisky therein. The said act does not provide any punishment or penalty for violating its provisions. It is contended that this fact should exercise no controlling influence in determining the question as to whether or not said act of 1890 repealed the act of 1884 or only amended it so as to allow a vote by districts as to whether or not prohibition should continue therein.

It is true that if the prohibition law of the district fixes no penalty for its violation, then the penalty fixed by the general law for like offenses would be the criterion of recovery. But the act also provides that if the majority of the votes cast in any district shall be against prohibition, the county judge shall grant license in said district to sell whisky, etc.

Now the act makes it essential to the right to sell whisky in any district of the county that the local option established by the law of 1884 be repealed by a vote of that district. To illustrate: Suppose there had not been a district election held under the law of 1890, can there be any doubt that the law of 1884 would have prevailed in such district, notwithstanding the act of 1890? because the act of 1890 authorizes the county judge to issue a license in that district upon the condition only that the people of the district vote to repeal the law therein, whereas, if the act of 1890 of itself repealed the act of

Kirkpatrick v. Commonwealth.

1884, licenses could be granted in any district that failed to vote on the question. But aside from this, we think the act of May 22, 1890, shows conclusively that the act of 1884 was only amended by the act of March 15, 1890, and not repealed.

The title of the act of May 22, 1890, provides that the act of 1884 be amended. Section 1 of said act provides that the act of 1884 be amended by adding thereto the following provisions, etc. It then provides that the provisions that are amendatory of the act of 1884 shall not be in force in any magisterial district which shall vote against prohibition under the act of March 15, 1890, re-submitting the question as to whether whisky could be sold therein. Now, we think it is clear the act of March 15, 1890, was only an amendment to the act of 1884, the intention of which was to resubmit the matter of prohibition, which existed in the whole county, to the magisterial districts of the county, in order that any district that desired the sale of whisky might vote for it, but in the districts that did not desire to make the change, the law of 1884, with its penalties, remained in force. But if we are mistaken in this, we feel certain that the act of May 22, 1890 (passed at the same session), was an attempt to amend the act of 1884, and to continue the same in force. But if it be a fact that the act of 1884 was repealed by the act of March 15, 1890, the Legislature had the right to thereafter re-enact the law of 1884, and the amendments of May 22, 1890, certainly had that effect.

At the time the act of May 22d was passed, the Legislature had the power to amend or readopt a previous act by its title. Here the title not only amends the act of 1884, but in the body of that act the act of 1884 is ex-

Collopy v. Cloherty.

pressly amended by adding new provisions. Therefore, whatever we may think as to the repeal of the act of 1884 by the act of March 15, 1890, we are bound to conclude that the Legislature did not intend to repeal it, but only to amend it, and that the act of May 22, 1890, clearly expresses that intention; and in order to effectuate that intention, so clearly expressed, we should regard the act of May 22, 1890, as re-enacting the act of 1884 rather than defeat the expressed will of the Legislature.

The judgments are affirmed.

CASE 57—PETITION ORDINARY—FEBRUARY 20.

Collopy v. Cloherty.

APPEAL FROM CAMPBELL CIRCUIT COURT.

1. **POWER OF CITY COUNCIL TO CREATE OFFICE.**—The provision in a city charter that the legislative, executive and ministerial power of said city shall be vested in certain officers named, "and such necessary deputies or assistants as may be required," can not be construed as denying authority to the Board of Councilmen to create other offices besides those enumerated in that section, and this would be true even if the power to appoint necessary deputies or assistants was not given in express terms. Therefore, notwithstanding such a provision in a city charter, the Board of Councilmen had power to create the office of "foreman of street repairs and overseer of the poor," such an office or offices being necessary to carry out the provisions of the charter.
2. **SUIT TO RECOVER OFFICE.**—In this action to recover such an office, it was not necessary for the plaintiff to set forth in his petition the entire ordinance of the Board of Councilmen creating the office in question, but to state substantially only so much thereof as is necessary to show *prima facie* his title and right to recover. Nor was it necessary for plaintiff to allege in terms he was eligible to the place, as it was not the duty of the Board of Councilmen to prescribe in terms any specific conditions or qualifications for such an office.
3. **SAME.**—As it is alleged a quorum of the Board of Councilmen was present when plaintiff was elected to the office, and he received a majority

Collopy v. Cloherty.

of the votes, all was alleged that was necessary on the subject, for whether a majority of a quorum was a sufficient number of votes to elect is a question to be determined by reference to the charter, and about which there can be no controversy.

ROOT & ROOT FOR APPELLANT.

1. Appellant having received a plurality of the votes cast, or a majority of the quorum, was elected. (Morton v. Yungerman, 11 Ky. Law Rep., 886; 1 Dillon on Mun. Corp., p. 334; section 23 of the Revised and Amended Charter of the City of Newport, approved February 17, 1874.)
2. The city had authority to enact the ordinance under consideration. The legislative grant of powers to the council over the streets, &c., of the City of Newport is plenary and absolute. (Section 12 of charter of February 17, 1874.)

CHARLES J. HELM FOR APPELLEE.

1. The petition is defective in that it does not set forth in *hac verba* or in substance the ordinance creating the office of foreman of street repairs, and overseer of the poor. Courts do not take judicial notice of ordinances of towns and cities.
2. There was no authority in the City of Newport to create offices. (Hawkins' Laws of Newport, sec. 4, p. 17.)
3. The petition is further defective in that it fails to allege the facts from which the court can know appellant to have been eligible to be elected to the office, and also fails to allege that a majority of a quorum was a sufficient number of votes to elect under the rules of the body.

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

Appellant brought this action to recover possession of the office of "foreman of street repairs and overseer of the poor," in the City of Newport, alleged to have been usurped and then illegally held by appellee. And this is an appeal from a judgment sustaining general demurrer to the petition, and dismissing the action.

1. It was not, as argued by counsel, necessary to set forth the entire ordinance of the Board of Councilmen creating the office in question, but to state, substantially, only so much thereof as is necessary to show *prima facie* his title and right to recover. It is alleged that in 1888 an ordi-

Collopy v. Cloherty.

nance was duly passed by said board providing for election of a person to act as foreman of street repairs and overseer of the poor in that city; and also sufficiently stated that the term of the office was to be for one year, beginning first day of each February. That one Roll was, in January, 1891, elected for one term, but before expiration thereof tendered his resignation, which was accepted, and appellee was thereupon appointed by the Board of Councilmen to hold said office, thus made vacant, during residue of the term ending February 1, 1892. That in January the Board of Councilmen duly elected appellant to said office for the term beginning February 1, 1892, and ending February 1, 1893. Whereupon he took the oath of office and executed the bond required by law. But that although he thereafter, and in due time, demanded of appellee possession of the office, he refused, and still illegally holds it. It seems to us there is enough stated in that connection to constitute a cause action, if the petition be not defective in any other respect.

2. It is contended the Board of Councilmen had no authority to create the office in question, because it is not mentioned or provided for in the following section of the charter: "The legislative, executive and ministerial power of said city shall be vested in a Mayor and a Board of Councilmen, consisting of two members from each ward, a City Clerk, Treasurer, Attorney, Engineer, Marshal, Physician, Assessor, Market Master, Weigher and Measurer, Wharf Master and Jailer, and *such necessary deputies or assistants as may be required*: each to possess the qualifications and serve for the terms hereinafter prescribed."

It would be an unreasonable construction of the charter to deny authority to the Board of Councilmen to create other offices besides those enumerated in that section, even if the power to appoint necessary deputies or assistants was not thereby in express terms given. For it would result that there could be neither a keeper of a poorhouse, workhouse or of a police station, although by section 6 of the charter each one of these places is provided for, and the Board of Councilmen is empowered to appoint officers to manage and superintend them. And though authority to create the office of foreman of street repairs is not so expressly given, still, as by section 12, public ways in said city are put under exclusive management and control of the Board of Councilmen, and improvements may be made and done as prescribed, either by *ordinance* or contract, power to create all offices necessary to successful conduct of the business, when done by ordinance, must be necessarily implied. In our opinion, therefore, the Board of Councilmen had authority to create the office in question, and to require of an incumbent to perform the duties of foreman of street repairs, and also those of a keeper of the poorhouse.

3. It does not seem to us to have been necessary for appellant to allege in terms he was eligible to the place, for it was not the duty of the Board of Councilmen to prescribe in terms any specific conditions or qualifications for such an office, and consequently the election of appellant, which he alleges took place duly and regularly, is conclusive in this case of his eligibility.

4. It is alleged a quorum of the Board of Councilmen was present when appellant was elected to the office, and he received a majority of the votes, which was, we think,

Buchannon v. Commonwealth.

all he need have alleged on that subject. For whether a majority of a quorum was sufficient number of votes to elect is a question to be determined by reference to the charter and rules of the board not inconsistent therewith.

In our opinion all facts necessary to constitute a cause of action in favor of appellant against appellee were stated in the petition, and it was error to sustain the general demurrer.

Wherefore the judgment is reversed and cause remanded for proceedings consistent with this opinion.

CASE 58—INDICTMENT—FEBRUARY 24.

Buchannon v. Commonwealth.

APPEAL FROM WOLFE CIRCUIT COURT.

REPEAL OF STATUTES.—The act of April 10, 1893, entitled "An act relating to crimes and punishments," was intended to be a complete system of statutory law relating to crimes and punishments; and as a consequence to supersede or repeal all existing statutes on that subject. Therefore, Section 96 of that act is to be regarded not merely as an amendment to the act of April 11, 1878, known as the "Ku-klux law," but as a substitute for the entire act.

HURST & BYRD FOR APPELLANTS.

1. The indictment is bad in that it charges the defendants with "confederating and banding themselves," when the offense, as set out in the statute, is that of *unlawfully* confederating and banding themselves together, etc.
2. Section 96 of the act relating to crimes and punishments contains the whole law upon the subject of confederating and banding together, and therefore the court erred in giving instruction No. 2 with reference to injury to person or property. (*Broadus v. Broadus*, 10 Bush, 308.)

WM. J. HENDRICK, ATTORNEY-GENERAL, FOR APPELLEE.

Section 96 of the act relating to crimes and punishments is merely an

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96	334
108	68
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118	581
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127	476

Buchannon v. Commonwealth.

amendment to the original Ku-klux law, and therefore it was proper for the court to give instruction 2 under section 4 of that law. (Acts 1891-'92-'93, sec. 96, p. 782; Ku-klux Act, General Statutes, p. 468, edition 1888.)

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

The indictment in this case charged appellants with the offense denounced in section 96, subdivision 12, chapter 182, Acts 1891-'92-'93, entitled "An act relating to crimes and punishments," approved April 10, 1893, as follows: "If two or more persons shall unlawfully confederate or band themselves together and go forth armed or disguised for the purpose of intimidating or alarming any person, or to do any felonious act, they shall each, on conviction, be imprisoned in the penitentiary not less than six nor more than twelve months." (The Kentucky Statutes, section 1223.) But it is stated in the indictment not only they were guilty of the particular offense described in that section, but that, in pursuance of the confederating and banding together, they did alarm, disturb and beat one Stephen Combs and injure his property. And the lower court instructed the jury they might, upon the latter hypothesis, fix the punishment at confinement in the penitentiary not less than twelve nor more than eighteen months.

The indictment seems to have been drawn and the jury instructed upon the theory that the section quoted was intended to be simply an amendment to, not a substitute for, the entire act approved April 11, 1873, known as the "Ku-klux law."

Section 2 of that act makes it a distinct offense for two or more persons to confederate or band themselves together for the purpose of intimidating, alarming or dis-

turbing any person or persons, or to do any felonious act, and fixes the punishment at confinement in the penitentiary not less than six nor more than twelve months, or, in discretion of the jury, a fine not less than one hundred nor more than five hundred dollars, and imprisonment in the county jail not less than three nor more than six months. While section 3 makes it an offense for two or more persons to unlawfully confederate or band together and *go forth* armed or disguised; though punishment is the same as prescribed in section 2. But section 4 provides that if *any injury results* to any person or property by reason of the unlawful acts denounced in the preceding sections, those engaged shall, on conviction, be confined in the penitentiary *not less than twelve nor more than eighteen months*.

As will be observed, in order to make a complete offense under section 96 of the act of April 10, 1893, it is essential not only that two or more persons unlawfully confederate or band themselves together, as provided in section 2 of the act of April 11, 1873, but that they *go forth armed or disguised* for the purpose of intimidating or alarming persons or to do a felonious act, as denounced by section 3 of that act. But it is manifest both sections were intended to be superseded or repealed by section 96 of the act of 1893. The main question, however, is whether that section has operated or was intended to repeal section 4 of the act of 1873; for if so, then it was an error of court affecting substantial rights of appellants to instruct the jury that twelve months was the minimum and eighteen as maximum punishment in case injury had resulted to the person and property of Combs.

The act of April 10, 1893, was, it seems to us, intended

Buchannon v. Commonwealth.

to be a complete system of statutory law relating to crimes and punishments, and as a consequence to supersede or repeal all existing statutes on that subject. For, under the comprehensive title of crimes and punishments, every offense mentioned in chapter 29, General Statutes, having the same title, as well as all others provided against by special acts, are considered and treated of in that act, which is formally divided into articles relating to different classes of crimes and subdivisions of each class. And as section 96, embracing only provisions of sections 2 and 3 of the act of 1873, is all on the subject the Legislature deemed necessary to engraft in the act of 1893, the conclusion is entirely reasonable that it was not intended that section 4, or any other part of the act of 1873, should be longer in force. This interpretation does not at all leave a person injured by reason of such unlawful acts without redress, or the person or persons who do the injury free from punishment.

As, therefore, section 4 of the act of 1873 was not in force when the alleged offense was committed, it was error to instruct the jury to fix any other kind or degree of punishment than that prescribed in section 96, act of April 10, 1893; and the judgment is reversed for a new trial consistent with this opinion.

Kelly v. Toney, Judge Jefferson Circuit Court, &c.

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CASE 59—MOTION—FEBRUARY 24.

Kelly v. Toney, Judge Jefferson Circuit
Court, Law and Equity Division.

1. A MOTION IN THIS COURT FOR A MANDAMUS is the proper remedy to compel the lower court to grant an appeal in cases where the party complaining is entitled to an appeal.
2. FINAL ORDER.—A judgment restraining a party from prosecuting any proceeding in another State to obtain possession of certain property and requiring him to dismiss an action then being prosecuted by him for such possession, and to send a telegram to his attorneys to that effect, appears upon its face to be a final order from which an appeal lies, and the judge of the lower court having refused to grant an appeal, a motion in this court for a mandamus to compel him to do so is sustained, as the term of the lower court at which the judgment was rendered has not yet expired. The mere fact that the judgment is made operative only "until the further order" of the court, does not make it merely an interlocutory order.

BYRON BACON, C. B. SEYMOUR, B. F. BUCKNER AND ERNEST
MACPHERSON FOR PLAINTIFF.

HUMPHREY & DAVIE FOR DEFENDANTS.

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

This case is before us on the motion of the complainant, Kelly, for a mandamus against the judge of the Law and Equity Division of the Jefferson Circuit Court to compel him to grant an appeal from the following judgment:

"John Mitchell v. Oregon Gold Mining Company. At a court held for the Jefferson Circuit Court, Law and Equity Division, on the 8th day of January, 1894:

"This cause having been heard on the motion of the plaintiffs to enjoin and restrain the defendant, Clinton W. Kelly, from proceeding to interfere with the possession of this court, through its receiver, of the property of the Oregon Gold Mining Company, situated in the

Kelly v. Toney, Judge Jefferson Circuit Court, &c.

County of Union, State of Oregon, and the court being advised, it is ordered that until the further order of this court the said defendant, C. W. Kelly, be and he is hereby enjoined and restrained from further prosecuting, or permitting to be prosecuted, any motion or proceeding to which he is party in the State of Oregon having for its purpose the taking of the possession of the property of said company in Union County, Oregon, or its mines, mills, machinery equipment or other property near Cornucopia, Oregon, or elsewhere in said State, and from further refusing or failing to cause his suit, now pending in said State of Oregon against said company, to be abated and dismissed so far as it seeks the appointment of a receiver of said property, or the taking possession of said property by a receiver, and from refusing and failing to withdraw his motion and proceedings in said case; and from taking or allowing to be taken any steps in said case in carrying into effect any motion or order for a receiver or for the taking possession of said property by a receiver. And the plaintiffs paid into the court herein the sum of five dollars, and on motion of plaintiffs leave is given to defendant, C. W. Kelly, to immediately withdraw said sum from the court herein, to be applied by him in paying for the sending of a telegram at once to his counsel in said suit in Oregon directing the withdrawal or dismissal of the proceedings for a receiver of said property, and directing that all efforts on the part of any receiver appointed on his motion to take possession of said property shall cease; and he is enjoined from failing or refusing to forthwith send such telegram."

On the 9th day of February, after this judgment was

Kelly v. Toney, Judge Jefferson Circuit Court, &c.

entered, Kelly, by his attorneys, moved the court to grant him an appeal from the order and judgment of January 9th. This motion was objected to by the counsel of the plaintiffs; the court sustained the objection, overruled the motion for an appeal, and hence this motion and petition for a mandamus.

In the case of Louisville Industrial School of Reform v. City of Louisville, 88 Ky., 584, it was held that a motion in this court for a mandamus was the proper remedy to compel the lower court to grant an appeal in cases when the party complaining was entitled to it. The appropriateness or legality of the remedy we do not understand counsel of the appellees to dispute; but it is urged that the order appealed from is not a final one, and hence from it no appeal lies. It may be admitted that in form the order may be regarded as preliminary, but in effect it terminates the right of Kelly to prosecute an action in Oregon whereby he may obtain possession of certain property alleged to belong to the company; and further, it requires Kelly to dismiss an action then being prosecuted by him for such possession, and to send a telegram to his attorneys to that effect.

It can not be said that upon complying with this order the complainant will be left *in statu quo*. His substantial rights are clearly affected. It is an order to surrender a right, and determines against Kelly his right to prosecute an action for specific purposes. It is true that the order is made effective or operative only "until the further order" of the court; but this is true of the judgments of all courts during the term at which the orders are entered. Such orders may be set aside; nevertheless, they may be appealed from if final in their effect. This judgment

Kelly v. Toney, Judge Jefferson Circuit Court, &c.

appears to have been entered in due course of the trial in a case then pending before the court, and, judging from the order, which alone is before us in this application, is not merely preliminary or provisional in its character. We perceive no reason why the appeal should not be granted.

The complainant can not obtain an appeal from this court until after sixty days from the date of the judgment complained of, and if denied an appeal below, he would be without remedy. After the appeal has been taken and the entire record brought before us, a clearer understanding may be had of the nature and effect of the judgment complained of. Upon its face, it seems to affect and terminate certain rights of the complainant, and he should have the chance to appeal to test the correctness of the judgment.

The clerk of this court will certify this opinion to the judge of the lower court, who will conform his ruling on the motion for an appeal to the views herein expressed by sustaining the motion of the complainant.

The motion for mandamus is sustained.

Schmidt v. Mitchell, &c.

CASE 60—MOTION—FEBRUARY 24.

Schmidt v. Mitchell, &c.

APPEAL FROM JEFFERSON CIRCUIT COURT, LAW AND EQUITY DIVISION.

1. THE CLERK OF THE COURT OF APPEALS HAS NO POWER TO GRANT AN APPEAL from a judgment until after the expiration of the term of the lower court at which judgment was rendered. Therefore an appeal granted by him during the term is absolutely void, and a supersedeas issued by him upon such an appeal being also void may be disregarded.
2. FOR A MERE IRREGULARITY IN THE GRANTING OF AN APPEAL or the issual of a supersedeas, the proper remedy is by a motion to dismiss the appeal or discharge the supersedeas. It is only where the appeal and supersedeas are void that they may be disregarded.

C. B. SEYMOUR, BYRON BACON AND ERNEST MACPHERSON,
FOR MOTION.

1. The order appealed from is a final order and appealable. (Civil Code, sec. 388; *City of Newport v. Newport Light Co.*, 92 Ky., 445.)
2. The clerk had a right to grant the appeal and issue the supersedeas. (Civil Code, sec. 784; *City of Newport v. Newport Light Co.*, 92 Ky., 445.)

The case of *Louisville Industrial School of Reform v. City of Louisville*, 88 Ky., 584, explained.

3. Neither the court below nor any court except this court had the right to pass upon the validity of a supersedeas regular in form; and when a writ is produced which is genuine and which on its face is the writ of this court, it must unhesitatingly be obeyed.

B. F. BUCKNER ON SAME SIDE.

1. The order appealed from is a final order. (*City of Newport v. Newport Light Co.*, 92 Ky., 445.)
2. The appeal was properly granted by the clerk of this court. (Civil Code, sec. 784; *Steffen's Ex'ors v. Hutchings*, overruling motion to dismiss, September 19, 1891.)
3. Upon the question of the right to appeal from the contempt, see *Rapalje on Contempt*; *Worden v. Searce*, 121 U. S., 24-6; *Romeyn v. Caplis*, 17 Mich., 449; *Whittier v. State*, 36 Ind., 196; *Gaudy v. State*, 13 Neb., 451; *In re Hummel*, 9 Watts, 416; *Commonwealth v. Newton*, 1 Grant, 454; *Stuart v. People*, 4 Ill., 395; *In re Deatin*, 105 N. C., 59; *Myers v. State*, 46 Ohio, 478; *People v. Hackley*, 24 N. Y., 77; *Pitt v. Davidson*, 87 N. Y., 235.

Schmidt v. Mitchell, &c.

HUMPHREY & DAVIE FOR RESPONDENTS.

1. The right to an appeal is a purely statutory right and the right must be exercised in the manner provided for by the statute. (Elliott on Appellate Procedure, secs. 19, 111.)
2. A grant of an appeal by the clerk of this court before the expiration of the term at which the judgment was rendered is a nullity. During the term the lower court alone has the right to grant the appeal. (Civil Code, secs. 734, 749; *American Accident Co. v. Reigart*, 92 Ky., 142; *City of Bowling Green v. Elrod*, 14 Bush, 216; *Wright v. Woolfolk*, 14 Bush, 808; *Newport v. Newport Gas Light Co.*, 92 Ky., 445; *City of Louisville v. Louisville Industrial School of Reform*, 88 Ky., 589.)

Order overruling motion to dismiss appeal in *Steffens v. Hutchings* distinguished.

3. In Kentucky a judgment committing a person to jail for contempt of court in disobeying an order of court is not an appealable order, and a supersedeas issued by the clerk upon such an appeal is void. (Carroll's Code, note 22 to sec. 734; *Patton v. Harris*, 15 B. Mon., 607; *Commonwealth v. Johnson*, 1 Bibb, 598.) And this is not only the rule in Kentucky, but is the general rule. (*Rapalje on Contempts*, sec. 148.)

The case of *City of Newport v. Newport Gas Light Co.*, 92 Ky., 445, distinguished.

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

On January 31, 1894, the appellant, Schmidt, filed in the office of the clerk of this court a copy of the judgment against him in the Jefferson Circuit Court, Law and Equity Division, in the case of *John Mitchell, &c., v. The Oregon Gold Mining Company, &c.*, and was granted an appeal therefrom by the clerk, who also issued a supersedeas upon the execution by the appellant of the bond required by law.

The inferior court declining to stay proceedings upon the judgment appealed from, the appellant seeks a rule against the judge of that court and certain of the appellees to show cause why they have disobeyed the order of supersedeas.

It is evident that unless this order was absolutely void,

Schmidt v. Mitchell, &c.

it was the duty of the court below and all others to obey it, and if they wished to avoid it by reason of any irregularity in the manner of its issual, a motion to quash would have been the proper remedy. The inquiry therefore is as to the validity of the order of supersedeas.

The judgment sought to be appealed from was rendered on January 30, 1894, the day before the appeal was granted and the supersedeas was issued. This, therefore, was during the term of the inferior court at which the judgment was rendered. Section 734 of the Civil Code provides that an appeal shall be granted as a matter of right "by the court rendering the judgment, on motion made *during the term* at which it is rendered, or *thereafter* by the clerk of the Court of Appeals on application of either party or his privy, upon filing in the office of said clerk a copy of the judgment from which he appeals." Therefore the granting of the appeal and the issual of the supersedeas were unauthorized, and these acts were not mere irregularities, to be taken advantage of by motions to dismiss the appeal or to discharge the supersedeas. They are void, and therefore may be disregarded. If the bond were insufficient as to the surety offered, or defective in securing the rights of the appellee, a motion to discharge would have been the proper remedy; or, if the appeal were improperly granted, or the appellant's right to persecute it further had ceased, then a motion to dismiss would be proper. (See sections 750 and 757 Civil Code.)

In *American Accident Company v. Reigart*, 92 Ky., 142, it was held that the lower court could only grant the appeal during the term at which the judgment or order was rendered. An appeal thereafter granted was

void. The principle of that case is that the lower court has the exclusive right to grant an appeal within the term and after that the clerk of the Court of Appeals has the exclusive right to grant it.

To the same effect is the case of *City of Newport v. Newport Gas Light Company*, 92 Ky., 445, where it is said: "Four days after this judgment was rendered the appellants sued out an appeal from this court and superseded the judgment. Thereafter, and for the reason, doubtless, that under our Code an appeal can only be granted during the term at which it is rendered, by the court rendering it, and which term of the Louisville Law and Equity Court expires sixty days from the judgment, the appellants asked that court to grant them an appeal. It was refused, and after the expiration of the term they sued out another appeal from this court and again superseded the judgment." The valid supersedeas was the second one sued out after the expiration of the term of sixty days. So also in the case of *Louisville Industrial School of Reform v. City of Louisville*, 88 Ky., 584, it is said that "there is no way for a party to bring a judgment of an inferior court to this court for reversal or modification until after the term at which it was rendered has expired, unless the appeal be granted by such inferior court." Upon the refusal of the inferior court to grant the appeal, the appellant, if he be otherwise entitled to such appeal, may obtain one from the lower court during the term by motion in this court for a mandamus. In this case he is clearly entitled to the appeal as a matter of right, and upon an application therefor the lower court will grant it. That it affects the sub-

 Rawlings, &c., v. McRoberts, &c.

stantial rights of the appellants and is final in its effect is shown in the Kelly motion this day determined (Kelly v. Toney, Judge, &c., 95 Ky., 388.)

The motion is overruled.

CASE 61—PETITION EQUITY—MARCH 8.

Rawlings, &c., v. McRoberts, &c.

APPEAL FROM FLEMING CIRCUIT COURT.

1. THE FACT THAT A WRITING IS IN THE FORM OF A DEED IS PERSUASIVE THAT A DEED AND NOT A WILL WAS INTENDED, but it is not conclusive, and if it appears that no interest was intended to vest until after the death of the person named as grantor the writing will, notwithstanding its form, be held to be a will.
2. A WRITING IN FORM A DEED by which the person named as "party of the first part" undertook to dispose of all his estate, specifically describing the lands, and providing that "this conveyance to be put to record, but not to take effect so as to give possession until after my death," is held to be a deed and not a will, although the grantor recites as a reason for executing the instrument that he is "a bachelor, now advanced in years, has numerous kinspeople, and in view of the uncertainty of life desires to make a distribution of his estate, to go into effect on and after death." The fact that the writing is to be put to record shows that the title is to vest at once, only the distribution and possession being postponed until the grantor's death.

W. G. DEARING, JOHN P. MCCARTNEY, JOHN S. POWER,
WM. H. HOLT AND EDWARD W. HINES FOR APPELLANTS.

1. Whether a writing is a deed or a will depends upon the intention of the maker to be gathered from the instrument as a whole. (Simon v. Wildt, 84 Ky., 188; Phillips, &c., v. Thomas Lumber Co., 94 Ky.: Habersham v. Vincent, 2 Ves. Jr., 281.)
2. The various provisions of the instrument in question here show that neither the title nor the possession was to vest until the maker's death, and therefore that a will and not a deed was intended. (Turner v. Scott, 51 Pa. St., 126; Leaver v. Gauss, 62 Iowa; Hazelton v. Reed, 82 Cent. L. J., 516; Sperger v. Balster, 66 Ga., 317; Carleton v. Cameron, 88 Am. Rep., 20; Crawford v. McElroy, 2 Spear, 225;

Rawlings, &c., v. McRoberts, &c.

Sheppard v. Nolans, 6 Ala., 631; Ragsdale v. Booker, 2 Bail., 590; Johnson v. Yancy, 65 Am. Dec., 646; Wilburn v. Weaver, 63 Am. Dec., 242; Bench v. Nik, 50 Ark., 36; White v. Hopkins, 9 Ga., 430; Knott's Adm'r v. Hogan, 4 Met., 101; Stevenson v. Huddleson, 18 B. M., 306; Cunningham v. Davis, 62 Miss., 366; Gillham v. Mustin, 42 Ala., 385; 1 Jarman on Wills, 17; 1 Redfield on Wills, 169-70, note 21.)

WM. J. HENDRICK FOR APPELLEES.

The instrument in question is a deed and not a will. (Phillips v. Thomas Lumber Co., 94 Ky.; Reynolds v. McFarland, 10 Ky. Law Rep., 932.)

WM. G. BULLITT ON SAME SIDE.

1. Technical rules are not followed in construing deeds under the statute of this State. (Davis v. Hardin, 80 Ky., 672.)
2. The intention of the maker, as gathered from the instrument as a whole, must determine whether a deed or a will was intended. (Mayo v. Snead, 78 Ky., 634.)
3. The reservation of a use or interest for life in the estate granted, creates a life estate in the grantor. (1 Washburn on Real Property, 88.)
4. In case of the reservation of an interest in the estate granted, the title to the whole estate passes to the grantee upon the execution of the deed of conveyance, and the interests so reserved must be a new estate carved out of the estate conveyed, such as a rent or annuity or a life estate. (2 Washburn on Real Property, 692-694.)
5. Where both realty and personalty are given by deed, such a deed is properly recordable under the Kentucky statute. And when a gift is evidenced by deed duly recorded, a change of possession is not necessary. (3 Litt., 278.)

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

The sole question to be determined on this appeal is whether the following instrument is a deed or a will:

"This deed of conveyance made and entered into this 6th day of April, 1891, by and between Austin Rawlings, of Fleming County, Ky., of the first part, and Thomas R. McRoberts, William McRoberts, John McRoberts, James McRoberts and George McRoberts, of Fleming County, Ky., of the second part, witnesseth: That whereas Austin Rawlings, a bachelor now advanced in years, has numerous kinspeople; and whereas, in view of the uncer-

Rawlings, &c., v. McRoberts, &c.

tainty of life, said Rawlings desires to make a distribution of his estate to take effect, however, and to go into effect on and after death. Now, in consideration of one dollar cash in hand paid, the receipt whereof is hereby acknowledged, the said Austin Rawlings has this day aliened, sold and conveyed unto the said George McRoberts, a great nephew, all my right, title and interest in and to all that tract or parcel of land bought by said Rawlings of James Rice, and which land is situated in Fleming County, Kentucky, on the waters of Locust Creek, and the same is bounded . . . supposed to contain about one hundred and fifty acres, to him, his heirs and assigns forever, with covenants of general warranty to have possession at my death. This is understood to pay George McRoberts for the kindness, care and nursing rendered me, and which may be necessary hereafter while I may live. The said Austin Rawlings has also this day aliened, sold and conveyed jointly to Thomas McRoberts, James McRoberts, William McRoberts, and John McRoberts all his right, title and interest in and to all the residue of his said land of which he is now seized, consisting of about . . . acres, the same being situated in Fleming County, Kentucky, and is described as follows, to-wit: (Giving metes and bounds of several tracts.) All of the foregoing tracts and parcels of land, the said Austin Rawlings for and in consideration of love and affection, and as recited heretofore, he hereby aliens, sells and conveys unto the said parties of the first part, namely, Thomas McRoberts, John McRoberts, James McRoberts, and William McRoberts, their heirs and assigns forever, with covenants of general warranty. This conveyance to put to record, but not to take effect so as to give possession until after

my death, at which time they are to divide the same as they see fit and proper. It being the intention of said party of the first part to make each and all of the parties of the second part equal as near as possible, who are my nephews (sons of my deceased sister, whom I have raised). Said party of the first part further conveys and stipulates that at his death whatever money, notes or personal property remains, is to be divided equally between said last-named four nephews, each accounting for sums advanced, not taking into consideration rents, which are not to be taken against them after paying at my death fifty dollars to Elizabeth McRoberts, wife of George McRoberts, for kindness and attention to me while living. To have and to hold unto the said George McRoberts, Thomas R. McRoberts, James McRoberts, John McRoberts, his heirs and assigns forever. In testimony whereof the party of the first part has hereunto subscribed his name, day and year first above written.

"Signed:

A. RAWLINGS.

"Attest: JAMES MCCREARY."

This instrument was signed and acknowledged by the grantor before James McCreary, the clerk of the Fleming County Court, who had also witnessed the signature of the grantor, and it was thereupon recorded in that office.

The contention of the appellants, who were the plaintiffs below, is that, although the document is couched in the form of a deed, and has the usual words of conveyance, yet it is, in fact, a testamentary disposition of the property described, and hence a will. They sue for the land sought to be conveyed to the appellees, because the writing as a will is not effective through lack of proper attestation under the statute. It is, of course, true that

the form of the instrument is not conclusive of the intention of the maker of it, nevertheless, if the writing have all the requisites of a deed, it is a fact throwing strong light on the intention.

Here we have grantor and grantee and the ordinary words operative of conveyance; we have the thing granted, the consideration expressed, the execution, including signing, attestation and acknowledgment, delivery, acceptance and registration.

As Lord Coke would put it, we have the premises, habendum, tenendum, reddendum, condition, warranty and covenants.

But with all this, if the instrument have no present operation, if intended to vest no present interest, but only appoints what is to be done after the death of the maker, it is a testamentary instrument. It seems to us, however, that besides the fact that the form of the writing shows the intention of the grantor to make an ordinary deed, with possession postponed until after his death, the significant fact that the instrument was to be put to record, is substantially conclusive of the point involved. This shows its irrevocable nature. "This conveyance to be put to record, but not to take effect so as to give possession until after my death" is the language. And then what? Not that the grantees are then to own the lands, or take the lands. They are made the *owners* by the instrument, but they are to divide what is already theirs. It seems to us that if the express words of the grant are to control, the instrument must be construed to be a conveyance with possession of the land conveyed postponed until after the death of the grantor. If a will, then it was revocable, and the provision that it was to go to

record is wholly inconsistent with the thought of revocation. The intention was to put the instrument, solemnly acknowledged as it was in due form of law, forever beyond the control of the maker, but in providing for this putting it on the record, as indeed was its ordinary course, as the grantor knew, he was careful to have this expected registration so operative as not to give instant possession, as it ordinarily would do. It may be true, as contended, that the reasons given for making the instrument are those often given by testators when about to make their last wills and testaments; but the fact that the grantor was a bachelor, advanced in years, had numerous kinspeople, and desired to make a distribution of his estate, because of the uncertainty of life, are all facts fully consistent with the intention of making a disposition or distribution of his property by a deed, and while it is provided that that "distribution" was to take "effect only on and after death," and thus the characteristics of a will are suggested, yet looking at the express effect to be given the recording of the instrument—that is, to delay merely the possession—we are constrained to the conclusion that the intent was to make an irrevocable conveyance of the fee, the enjoyment of which only was to be deferred until after the death of the grantor.

The language "to take effect however and to go into effect on and after death" is supposed by counsel for the appellants to be conclusive of the question. But it will be observed that it is not said that the *writing* is to take effect or go into effect on and after death! The words of the grant, those which are operative of conveyance, are effective immediately. They are in the present tense—the grantor "hereby aliens, sells, and conveys," etc.—but the

distribution, that is, the division, provided for, not the grant, is postponed until after the death of the grantor.

It is not true, as so earnestly argued by counsel, that in positive and unequivocal terms, the *deed* was not to take effect or go into effect until on and after death. It was the possession merely, the actual division and distribution, that was thus postponed. No inferences arising out of the gifts of the personalty as made in the deed can be allowed to overreach the clear terms of the grant of the real estate, no questions respecting the personal property being before us.

Numerous cases are referred to in which certain writings are held to be wills rather than deeds; the underlying principles being the same in all of them. By like energy, no doubt, as many instances might be found where the instrument has been held to be a deed, rather than a will. Cases are useful in determining questions like the one before us only as they illustrate the principles involved. It would be unprofitable to discuss them or distinguish them from the case under consideration.

We have examined them and find them merely declaratory of the well-known distinction between wills and deeds. They throw no light on the intention of Austin Rawlings in making the deed of April, 1891.

The judgment dismissing the petition and upholding the writing in contest as a deed is affirmed.

Omer v. Commonwealth.

CASE 62—INDICTMENT—MARCH 8.

Omer v. Commonwealth.

APPEAL FROM UNION CIRCUIT COURT.

95	353
123	188
123	477

95	353
132	678

1. **HOMICIDE—AIDERS AND ABETTERS.**—As it appeared upon the trial of appellant for murder that he said nothing and did nothing at the time of the killing, the case against him rests on the intent with which he was present, as he is guilty of murder only in the event his companions were so guilty and he was present in pursuance of a mutual understanding to carry out some unlawful purpose. Therefore, it was error to give an instruction which authorized the jury to acquit only in the event some one of the appellant's companions fired upon the party of the deceased without the "knowledge or assent" of the appellant, as the "knowledge" imputed in the instruction is the knowledge of the firing at the time it occurred, the hypothesis upon which the instruction was based precluding the idea that a previous knowledge was meant.
2. **CONSPIRACY—EVIDENCE.**—Although a conspiracy between appellant and his co-defendants was charged the court properly refused to allow him to prove the good character of his co-defendants.
3. **SAME.**—The court did not err in refusing to allow the alleged co-conspirators to testify in behalf of appellant.
4. **SAME.**—The deceased being one of the party which had abducted a friend of the defendant's, testimony to the effect that some one in the excited crowd that gathered just after the abduction cried out, "Go for William Omer" (the appellant), was incompetent and prejudicial, neither appellant nor any of his co-defendants being present at the time.
5. **SAME.**—The abduction being made for the purpose of forcing the person abducted to marry the deceased, what was said and done on the occasion of the attempt to consummate the marriage was not competent evidence, neither the appellant nor any of his co-defendants being present.
6. **INSTRUCTION AS TO MURDER—PREJUDICIAL ERROR.**—The failure of the court, in instructing the jury as to murder, to require them to find that the killing was "feloniously" done in order to convict of that offense, was not prejudicial error in this case.

P. B. MILLER AND YEAMAN & LOCKETT FOR APPELLANT.

1. If illegal evidence prejudicial to the accused has been admitted over his objection, this court will not speculate as to its effect on the jury, but reverse the case and order a new trial. (Coppage v. Commonwealth, 3 Bush, 533; Kennedy v. Commonwealth, 14 Bush, 361 McGraw v. Commonwealth, 14 Ky. Law Rep., 344-5.)
2. The explanations of bystanders in the absence of the accused were not

Omer v. Commonwealth.

- competent evidence against him. (Bradshaw v. Commonwealth, 10 Bush, 576; Werner v. Commonwealth, 80 Ky., 376.)
3. The testimony of Judge Flournoy as to the conversation between Henry Delaney and Abbie Oliver was improperly admitted.
 4. No declaration of a conspirator made after the conspiracy is ended by its failure or success can be used against a co-conspirator. (1 Greenleaf on Evidence, sec. 111; 3 Greenleaf, sec. 94; 2 Bishop on Crim. Proc., sec. 191; Logan v. United States, 144 U. S., 308-9; 78 Ky., 16; Shelby v. Commonwealth, 91 Ky., 569; Encyclopedia of Law, vol. 4, 682-8.)
 5. It was competent for appellant to prove the good character of his alleged co-conspirators. (4 Am. and Eng. Ency. of Law, p. 632.)
 6. The jury should have been required to find, in order to convict, that the killing was *feloniously* done. (Kaelin v. Commonwealth, 84 Ky., 354; Hamilton v. Commonwealth, 5 Ky. Law Rep., 929.)
 7. It was the duty of the court, with or without request from defendant, to give the whole law of the case. (Blimm v. Commonwealth, 7 Bush, 327; Brady v. Commonwealth, 11 Bush, 288-9.)
 8. The agreement of the parties to go to Morganfield armed as they were to interpose and protect Henry Delaney by whatever force might become necessary was not a conspiracy. (4 Am. and Eng. Ency. of Law, p. 588; 2 Bishop on Crim. Law, sec. 149, third ed.; 3 Greenleaf on Evidence, sec. 89.)
 9. The evidence was such as to authorize instructions both as to manslaughter and self-defense.
 10. Instruction 5 was erroneous, because under it the jury could not acquit if the defendant either consented to or knew of the shooting, which is not the law. (True v. Commonwealth, 90 Ky., 653.)
 11. The court should have instructed the jury, as requested by appellant, that if Henry Delaney was, by force, taken with the intent to force him to marry Abbie Oliver, or kill him, his friends, if they had reasonable grounds to believe he would be forced to marry her or be killed, had the right to arm themselves and follow for the purpose of defending him, and if some of the others killed her the defendant was not guilty. (Campbell v. Commonwealth, 88 Ky., 408.)

WM. J. HENDRICK, ATTORNEY-GENERAL, FOR APPELLEE.

1. The fact that the parties indicted were frequently seen together for some weeks prior to the indictment was competent evidence, being a circumstance tending to show a conspiracy.
2. While the court will not *speculate* upon the effect of evidence, it will not reverse because of the admission of evidence that plainly does not bear upon the issue, and could not have influenced the verdict.
3. Evidence of the good character of the appellant's co-defendants was not competent.
4. When persons combine to do an unlawful thing, if the act of one, pro-

Omer v. Commonwealth.

ceeding according to the common plan, terminates in a criminal result, though not the particular result meant, all are liable. (1 Bishop on Criminal Law, secs. 636, 641.)

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

In the village of Sturgis, in Union County, at about ten o'clock at night, on the 4th day of April, 1893, Taylor Oliver and his wife, each well armed, entered the place of business of Henry Delaney, and demanded that he go at once with them and marry their daughter, Abbie, whose ruin, they charged, he had accomplished. He denied the charge, but upon being threatened with instant death he gave up his pistol and proceeded with the Olivers to a surrey a short distance away, in which the daughter was waiting. During this time some three or four shots were fired by the Olivers. The parties at once drove to Morganfield, some twelve miles away, where the county clerk was aroused and a marriage license procured. The county judge, found some two miles distant, was awakened and asked to marry the couple, but upon Delaney detailing the circumstances of his capture and his unwillingness to marry the girl, the officer refused to perform the ceremony. Quite a scene ensued, and the prisoner was told that he would be given one more chance, but that if he made any objection to the next officer approached, they would instantly kill him. A minister was then found, who performed the rites while the parties remained in the carriage. They then started back, and upon reaching the Tur hill, some two miles from Morganfield, at about two o'clock in the morning of the 5th, they were met by a party of Delaney's friends, when a sudden firing began, in which Abbie Oliver was killed and her father severely shot in the arm and face.

Omer v. Commonwealth.

At the July term of the Union Circuit Court the appellant and some eight others were jointly indicted for the murder of the girl, and, upon the trial of the accused at the November term, he was found guilty, and his punishment fixed at confinement in the penitentiary for life. Upon this appeal he insists that certain instructions given the jury were misleading and otherwise prejudicial to him; that much testimony for the State which was incompetent was admitted, and some excluded which was competent.

For the purposes now at hand, it will be necessary only to review briefly the appellant's connection with this tragedy. He appears to have been entirely friendly with the Olivers, and was a friend of young Henry Delaney, and prior to the night of the latter's capture was seen with him and other friends at various times. On that night he was engaged in doctoring a sick horse, and went to the drug store at which Delaney was employed for medicine. He there learned of the kidnaping, and after a consultation with other friends it was decided not to apprise the relatives of young Delaney of the occurrence, but upon reflection, and after leaving the excited crowd, the accused and Tate agreed that they ought to let Holt, the brother-in-law of Delaney, know of his peril. They walked over to Holt's, about a mile out of town, and told him of the trouble. It was then agreed that George Delaney, Henry's brother, should know the facts. In a short while some eight or ten of the neighbors and friends of Henry Delaney, including the accused, the relatives named and others, gathered at the village, and it was agreed that they would go over to Morganfield to find

Omer v. Commonwealth.

out what had become of the parties. At this point the accused thus testifies :

"They were my neighbors, and I thought I would go with them to Morganfield, get breakfast, see what they had done with Henry Delaney, and get back by dinner. We started to Morganfield ; I didn't see Holt and Thomason until I got to Elijah Hughes'. We didn't think that they could go to Morganfield and be married that night, as it was twelve miles to that place and late at night when they left Sturgis. Tate and I rode together and were behind all the parties, until Thomason got out of the buggy at the Young hill, when we rode past them. I did not expect to meet the Olivers on the road. Frank Holt and Louis Land were in front, and George Delaney and Carter next. Tate and I were some distance behind. Just as Tate and I got to the top of the Tur hill I saw the surrey coming, meeting us at the foot of the hill. George Delaney, Land, Frank Holt and Carter were some distance in front of us, and as they met the surrey I heard a pistol-shot. Don't know who fired it. The second shot was over the horses, came from right to left across the surrey, and was a pistol-shot. I was some forty or forty-five yards behind, and couldn't tell who fired it, but think it was fired from the surrey ; some seven or eight other shots were then fired. I had a thirty-two caliber pistol, but never fired it that night," etc.

Taylor Oliver, as to the occurrences at the hill, testified as follows: "When about one-half way up Tur hill, two miles from Morganfield, four men rode up on horseback, and Frank Holt said, 'Hold up,' or 'Hold on, there,' and immediately began firing. Some fourteen or sixteen shots in all were fired. Frank Holt and another went on

the right, and George Henry and George Delaney on the left side of the surrey. I was shot first in the arm with a shotgun by Frank Holt. As I turned my head to look behind me I was shot in the right jaw by a thirty-two caliber pistol. I don't know who shot me in the face," etc.

Mrs. Oliver testified thus as to the meeting: "At the Tur hill, about half-way up, I was driving, when four men abreast met us, two going on each side. I was on the left side and Abbie immediately behind me. George Henry and George Delaney were the men on my side. Some one said, 'Hold up, there,' and immediately the firing began. George Henry shot at me with a pistol and George Delaney rode behind and shot Abbie. He was right at the surrey. He rode a gray horse. Positive that both George Delaney and George Henry were there. Knew them both well," etc.

This was the whole of the testimony introduced on the trial as to the details of the killing. The accused, however, offered to prove by Tate and George Delaney that he was some forty or fifty yards from the surrey when the shooting occurred, and that he did not shoot or incite or encourage any one else to do so, and that Carter, Land, George Delaney and Holt were all in front of Tate and the accused when the firing commenced. This proof the court rejected upon the ground that a conspiracy had been made out against the accused and the witnesses offering to testify.

It can not be contended from the proof that the accused either killed the deceased or wounded her father, or, indeed, took any part in the shooting. His crime, if he committed any, must consist in his being on the ground,

Omer v. Commonwealth.

and by his presence aiding, encouraging or inciting others to kill the Olivers or do them bodily harm. And this is only possible if he were there in pursuance of an agreement to commit some unlawful act. The testimony is clear enough, indeed, is uncontradicted, that he said nothing and did nothing at the time of the immediate killing. Nevertheless, if by his presence he gave aid or encouragement to the others engaged in the fight, he is guilty of murder, if they were so guilty, provided he was there in pursuance of a mutual understanding to carry out some unlawful purpose. His presence alone, without such an understanding, does not make him responsible for the acts of the others. Therefore, the case against him rests on the *intent* with which he was present, to be gathered from the proof and all the circumstances shown in the case.

In this connection we notice the instruction most seriously complained of, as it bears directly on this vital issue.

"If the jury believe from the evidence that the defendant, Omer, had no understanding with any of the parties named that if overtaken or met the Olivers, or some of them, were to be assaulted with weapons or otherwise mistreated, and did not know of such understanding among any of the others, and had no such purpose on his own part, but was going to release, or cause to be released, Henry Delaney, in a peaceable and lawful way, *when some one of said parties, without the knowledge or assent of the defendant, Omer, fired upon the Olivers and killed Abbie Oliver, they will find him not guilty as charged.*"

Here the defendant, although assumed to be on a lawful mission and bent on the use of peaceable means only, having no notice or knowledge of a different intent on the part of others, is to be acquitted only in the event

Omer v. Commonwealth.

that the deceased was shot and killed by some one of the accompanying party *without his knowledge or consent*. Necessarily, the jury understood from this, and were in effect told, that if she were fired upon and killed by some one other than defendant, *with the defendant's knowledge or consent*, the defendant was guilty.

This instruction was absolutely fatal to his defense. It would avail him nothing to show that he was along for a lawful purpose, or intended no harm to any one, or did not encourage or incite any one to do an unlawful thing, if he was to be held responsible for the firing upon the Olivers simply because he had *knowledge of such firing*.

It can not be said that the knowledge attributable to the accused, in the meaning of the instruction, was previous knowledge of the assault to be made with weapons, or knowledge that the Olivers were to be fired on when met or overtaken, because the instruction expressly excludes this, and is based on the hypothesis that the defendant had no knowledge or understanding in advance that the Olivers were to be fired on. The knowledge imputed in the instruction, therefore, is the *knowledge of the firing* at the time it occurred.

In the late case of True v. Commonwealth, 90 Ky., 651, the words "approve of" and "consent to" were condemned as not suitably expressing the idea of aiding and abetting. The instruction was: "If they believe from the evidence that Samuel Sellars shot and killed Robertson, they should acquit the defendant, True, unless they believe from the evidence, beyond a reasonable doubt, that the defendant, True, at the time of said shooting and killing, was present and did, in some manifest manner, encourage, incite, *approve of*, or aid or *consent to* said shooting of

Omer v. Commonwealth.

said Robertson," etc. The words "encourage, aid or abet" and "counsel, advise or assist" were said to be words in appropriate use "to describe the offense of a person who, not actually doing the felonious act, by his will contributes to or procures it done, and thereby becomes a principal or accessory," etc. "But," say the court, "the words 'approve of' and 'consent to' do not, singly or combined, express the idea of willful contribution to or procurement of a felonious act, which is necessary to constitute guilt."

We conclude, therefore, that not only was the use of the word "knowledge" in the instruction under consideration erroneous and misleading, but likewise the word "assent," the distinction between the use of the words "assent" and "consent" being substantially imperceptible in this connection.

We perceive no other serious objection to the instructions, although the failure to use the word "feloniously" in the first instruction should be cured upon another trial. We are inclined to think that, owing to the peculiar nature of the facts set up by way of defense, that the failure to use these ordinarily necessary words was not prejudicial, but the omission should be supplied in the future.

It seems to us that the testimony of Onan that some one in the excited crowd, which had gathered about the drug-store just after the abduction of Henry Delaney, cried out, "Go for William Omer," was clearly incompetent. The witness proving this also proves that neither Omer nor any of his co-defendants were present. If the issue had been merely whether or not Omer had gone with the parties toward Morganfield, the proof would not have been misleading, or even material, because he in fact did

Omer v. Commonwealth.

go, but the issue was, whether there was a conspiracy or mutual understanding, and we can see at once how the use of these words, right at the inception of the undertaking, or in advance of the coming together of the parties who made the trip, would indicate or strongly intimate to the jury that Omer was the master spirit or ringleader of the enterprise, and who, upon the first appearance of danger, was to be sent for and consulted. He is shown by the Commonwealth not to have been present, nor were any of the alleged conspirators present when this declaration was made. In no aspect of the case therefore can it be held competent against the defendant.

We might not say that the graphic description of the exciting scene before the county judge, or the occurrence of the attempt to consummate the marriage, was so prejudicial as to require a reversal of the case, but the accused was not present, nor were any of the parties there for whose acts or words he is sought to be made responsible. What was said there was calculated to arouse the passions and inflame the minds of the jury, and should be excluded on any future trial.

The appellant contends that he should have been permitted not only to establish his own good character among the people of the community—as he did do—but also the good character of each of the parties indicted with him. At first blush it might seem plausible that, as it was sought to make the accused responsible for the acts of these parties, he should be permitted to show their good character, as rebutting the idea of conspiring with such men; but the accused alone was on trial, and his own conduct and character were involved. The rule would have to work both ways, and a good man caught,

Louisville Gas Company v. Clay.

ever so innocently, in bad company might be made to suffer from the establishment of such a rule, or if presumptions of guilt or innocence might be indulged in according as the party charged was in good or bad company.

We are not inclined to disturb the ruling of the lower court in refusing to allow the alleged co-conspirators to testify. For obvious reasons we shall not discuss the testimony on this point. The proof may be presented in an entirely different aspect on another trial, and we do not intimate what should be done under circumstances differing from those now before us.

For the reasons indicated the judgment is *reversed*, and a new trial is awarded to be had upon principles consistent herewith.

CASE 63—PETITION EQUITY—MARCH 8.

Louisville Gas Company v. Clay.

APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY DIVISION.

BANK STOCK HELD BY A MARRIED WOMAN IN HER NAME IS NOT HER SEPARATE ESTATE under section 15, article 4, chapter 52, General Statutes, unless there is some indication or expression on the face of the certificate or transfer-book of such stock to the effect that it is for her "use." The requirement of the statute, that it shall be expressed "that it is for the use of such female," means the same thing as the requirement of the former statute that it should be expressed to be for her "exclusive use;" and in the absence of some such indication or expression other than the mere fact that the stock was taken in the name of the "female," the statute extinguishing the marital rights of the husband has no application, and upon the death of the wife the stock passes as any other unfettered personalty belonging to her.

HUMPHREY & DAVIE FOR APPELLANT.

The attitude of our client is simply that of one desiring to be protected

Louisville Gas Company v. Clay.

against a double liability; and while we should much prefer to see the statute construed strictly, and to see the courts holding that the word "use," as it now appears in the statute, is equivalent to the words "exclusive use," as they appeared in the Act of 1888, and the Revised Statutes, yet so striking a change in the phraseology of the statute has induced us to insist upon its judicial construction. (See Gen. Stats., chap. 52, art. 4, sec. 15; Kent's Adm'r v. Deposit Bank of Owensboro, 91 Ky., 70; Harris v. Harbison, 9 Bush, 399; Bank of Louisville v. Gray, 84 Ky., 571.)

BARNETT, MILLER & BARNETT FOR APPELLEE.

Brief withdrawn.

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

Mrs. Pattie A. Clay died in December, 1891, leaving a husband, the appellee, and five children surviving her. The husband qualified as the administrator of his wife, and as guardian for his children.

When she died, Mrs. Clay was the owner of one hundred shares of the capital stock of the appellant, which had been issued to her in the usual form; the certificates reading that "Pattie A. Clay is entitled to . . . shares of the capital stock in the Louisville Gas Company, transferable in person or by attorney on the books of the company at their office in Louisville." Neither upon the face of the certificates nor on the stock-book of the company was there expressed any "use" to the holder, separate or otherwise.

The question on this appeal is, does the stock in question descend to the children of Mrs. Clay, or does it pass to her husband? The statute supposed to control the subject (General Statutes, chapter 52, article 4) is as follows:

"§ 15. If any stock in any of the banks or other corporations of this State is taken for or transferred to any female, and it is expressed on the face of the certificate

or transfer-book of such stock that it is for the use of such female, no husband of hers shall take any interest in such stock or the dividends thereon, and at her death it shall pass to her heirs; but if unmarried, she may dispose of it by will; or, if married, so dispose of it, with the consent of her husband, or without such consent, if so provided in the deed or will creating the trust. She may receive the dividends and give acquittances therefor, though married; but she shall not, in any way, anticipate the same, nor shall any dividend be paid upon an order or power given by her before the same is declared."

It seems to us that in order to impress on the stock the quality which extinguishes the husband's marital rights, two things are necessary:

1. The stock must be taken for her or transferred to her.

2. There must be some expression or indication on the face of the certificate or transfer-book of the stock to the effect that the stock is "for the use of the female."

It may be argued that if the stock stand in her name, she necessarily has the use of it, as it would be absurd to say that she had not the use of this which she owns. But the use she has as such owner is not the use created by the terms of the statute. The provision that the stock "is for the use of such female," when expressed on the certificates or stock-book, raises or creates a trust, and the statute in question operates to exclude the husband from taking any interest therein, although it may not be disposed of by will save with his consent. Unless these words, or words of similar import, are so expressed, we think the statute has no application in controlling the disposition or destination of the stock. It goes as any

Louisville Gas Company v. Clay.

other unfettered personalty of the wife. That which was to be expressed on the certificates under the old statute on this subject was, that such stock was "for the *exclusive* use of such female," and it is argued that by the omission of the word "exclusive," the present statute creates the trust, even if it be not expressed on the certificates of stock that it is for the use of the female.

This is but a repetition of the argument before alluded to—that the use of the property must follow its ownership, and that by simply putting it in the name of the female the use of it is implied. This construction renders nugatory the important requirement that upon the face of certificates, or on the stock-book, there must be expressed "that it is for the use of the female." If such had been the intention the statute would have read, "that when stock in any of the banks or other corporations of this State is taken for or transferred to any female, no husband of hers shall take any interest," etc.

We think the words of the present statute, "for the use of such female," mean the same thing as the words of the old statute, "for the exclusive use of such female," and that unless the certificate or transfer-book of the stock contains some such words indicative of the creation of such "use" in the female, the statute in question extinguishing the marital rights of the husband does not apply.

The judgment of the chancellor, giving the stock to the husband, is *affirmed*.

Coots v. Yewell, &c.

CASE 64—PETITION ORDINARY—MARCH 8.

Coots v. Yewell, &c.

APPEAL FROM DAVEISS CIRCUIT COURT.

96	387
115	418
96	397
1123	141
123	238
1123	239

1. **REMAINDER—TITLE IN ABEYANCE.**—Under a conveyance to one for life remainder to his “children, heirs and legal representatives,” the life tenant not having any children, the fee remained in the grantor, and upon his death vested in his heirs, and a conveyance from them to the life tenant vested in him the fee, subject to be defeated by his having children. The title did not remain in abeyance ready to vest in whoever might be the heirs of the grantor at the time of the death of the life tenant, and therefore a brother of the life tenant having united in the conveyance to him and afterward died before he died, the children of that brother are estopped by his conveyance to claim any interest in the land, as they take from their father and not from their grandfather.
2. **SAME.**—It was not the intention of the grantor to pass the fee to the heirs of the life tenant in the event he died without children.

SWEENEY, ELLIS & SWEENEY FOR APPELLANTS.

If the deed designates the persons who are to take the remainder upon the death of the life tenant, these persons alone can take under the deed; if it does not, the law of inheritance governs. This right of inheritance can not be from the life tenant who had no estate to transmit. It must be from Jeremiah Yewell, as we think, but in any event through him. Upon his death the contingent reversion in him descended to his children, and they might convey it. (*Bohon, &c., v. Bohon, &c., 78 Ky., 408; Herbert's G'd'n v. Herbert's Ex'or, 85 Ky., 138; 2 Minor's Inst., 72-3.*)

LITTLE & SON, POWERS & ATCHISON AND JOHN FELAND FOR APPELLEES.

John Yewell, the ancestor of appellees, never had any interest in the land in controversy after his father conveyed it to Sidney except the possibility of his being one of the persons, at the time of Sidney's death, who would meet the description of the remaindermen; but as the estate never vested in him under this contingency, he having first died, his contingency amounted to nothing; therefore his deed was never of any value either by way of actual conveyance or estoppel. (*Truman v. White's Heirs, 14 B. M., 569; Rev. Stats., chap. 80, sec. 10; Gen. Stats., chap. 63, sec. 10; Blackstone, book 2, p. 107; Kent, vol. 4, p. 258; Washburne, vol. 1, p. 70; Idem, vol. 3, p. 94;*

Coots v. Yewell, &c.

Bennett v. Taylor, 9 Cranch, 43; Dartmouth College Case, 4 Wheaton, 518; Encyclopedia of Law, vol. 21, Title Reversion; Williamson v. Williamson, 18 B. M., 329.)

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

Jeremiah Yewell, in December of the year 1840, executed a deed to his son Algernon S. Yewell, to a tract of land in Daveiss County "for and during his natural life, and the remainder in fee-simple to the children, heirs and legal representatives of the said Sidney, to have and to hold the said tract of land and appurtenances to the said Algernon Sidney Yewell for and during his natural life, and remainder in fee-simple to descend to and belong and appertain to the children, heirs and legal representatives of the said Sidney Yewell at his death as their absolute estate forever." His son Sidney, at the date of the conveyance, had neither wife nor children, and died childless without ever having had a child born to him. His father died before Sidney, and after the father's death his brothers and sisters, with a view of vesting in Sidney the fee, granted unto him by a regular conveyance all their right, title and interest, reversionary or otherwise, to this land. John Yewell, one of the brothers of Sidney, died before the latter, leaving children. Sidney, the life tenant, then died, and having sold and conveyed this land to the appellant, the children of John Yewell brought this action to recover their interest in the land, claiming to have derived title by descent from their grandfather, and that their father had no interest in it. The court below held that as John Yewell died before the life tenant (his brother) his (John's) children took from or through their grandfather and were entitled to recover as his heirs at law.

If the grandfather had survived his son John, the father of these children, in that event John's children would have inherited from their grandfather, because the title was in him, there being no one to take the remainder interest, but the grandfather was dead, leaving John Yewell one of his heirs together with his brothers and sisters, and they held the title in the same manner their father and the grandfather of their children held it during the continuance of the life estate. This was a contingent remainder in the children of the life tenant, supported by the life estate. There were no children living when the deed was made to Sidney, and none born, and therefore no title ever passed in remainder. The title, it is argued, was in abeyance, resting *in nubibus*, ready to pass to whoever might be the heir of the original grantor at the death of the life tenant, and upon this idea a recovery was permitted. Suppose the original grantor had survived the life tenant, and before the termination of the life estate had sold all his interest, reversionary or otherwise, to a stranger, would not the title have passed both by way of estoppel and because the failure of anyone to take the remainder left still in him the absolute fee? The grantor, however, died, and his interest passed to his heirs, and when they conveyed to the appellant did not their title pass in the same manner that it would have passed had the original grantor survived and made the conveyance before the death of the life tenant? They stood in his shoes, and a conveyance that would estop him would estop his heirs at law. These children of John do not inherit from their grandfather, but from their father. He took from his father and they from John, their father. The title did not pass from the

Coots v. Yewell, &c.

original grantor, because there was no one to take the remainder, and the title being with the grantor passed to his heirs at law, and John being one, the title to an interest was in him as heir, subject to pass from him on the happening of the contingency, viz., his brother Sidney having children. While this title was in John, the father of these appellees, he conveyed the land away, and there was nothing to pass to his children. The transition of the title was in abeyance ready for the remaindermen at the expiration of the life estate, or when coming into existence so as to take. The title in this case never left the original grantor, and when he died it passed to his heirs, and if he had sold this land instead of his children they could not have inherited it from him, as he and those under him would have been estopped to say that at the time he sold he had no title. Here is a contingent remainder created by deed. The title remains in the grantor until the contingency happens. It never did happen, and therefore the title remained in the grantor, and at his death passed to his heirs, and his heirs having sold the land their children are estopped from claiming.

Mr. Fearne says the title must remain in the grantor as there is no one to receive it. Where the devisee takes upon a contingency the title is in the heir, says Mr. Kent, subject to be defeated when the devise takes effect. (Kent's Com., vol. 4, p. 257.)

If a contingent remainder be created in conveyance by way of use the inheritance in the meantime remains in the grantor or his heirs, or descends to the heirs of the testator until the contingency happens. (Kent's Com., vol. 4, p. 257.) See Herbert's G'd'n v. Herbert's Ex'or, 85 Ky., 147.

In our opinion the recovery should have been denied; and the judgment is reversed, with directions to dismiss the petition. (Pryor v. Castleman, 9 Ky. Law Rep., 967.)

To a petition for rehearing filed by counsel for appellees, Judge Pryor delivered the following response of the court:

While the court may have failed to understand the theory upon which the recovery was permitted below, still it presented the real question involved. It is claimed that the title passed out of the grantor at the date of the grant, A. S. Yewell taking a life estate and the remainder interest being in abeyance waiting for some one to come into existence who could take it. The life tenant had no children, and he could have no heirs, in a legal sense, until his death, and dying without children it is claimed that the title then in abeyance went to the heirs of the life tenant.

It is manifest the remainder went to the children and not to the heirs of the life tenant in the event he had no children. This is the plain purport of the deed—"remainder in fee-simple to descend to and belong and appertain to the children, heirs and legal representatives of the said Algernon S. Yewell at his death as their absolute estate forever." The words "heirs and representatives" had direct reference to the *children* of the life tenant, and the language of the conveyance does not in express terms or by fair inference authorize the conclusion that it was the intention of the grantor to pass the fee to the heirs of the life tenant in the event he died without children. It is a plain deed to one for life, remainder to his children, and the contention that the heirs of Algernon took as purchasers, in the event the life tenant died child-

Oliver v. Commonwealth.

less, is not warranted by the language of the instrument. They took nothing under the deed, and the real point involved is the one discussed in the original opinion, and presents an interesting question.

Petition overruled.

CASE 65—INDICTMENT—MARCH 10.

Oliver v. Commonwealth.

APPEAL FROM PERRY CIRCUIT COURT.

INDICTMENT.—The provision of the Code requiring an indictment to be indorsed "a true bill" is mandatory and not merely directory, and if an indictment is not so indorsed it is not a valid indictment and should be dismissed on demurrer.

JOHNSON, HURST & EVERSOLE FOR APPELLANT.

No brief in record.

WM. J. HENDRICK, ATTORNEY-GENERAL, FOR APPELLEE.

1. The law denouncing a penalty for cutting or sawing off the brands of saw-logs is constitutional. (Commonwealth v. Puckett, 92 Ky., 206.)
2. Is it necessary to the validity of an indictment that it should have indorsed on the back thereof "a true bill," followed by the signature of the foreman? The answer to this question depends upon the construction of section 119 of the Criminal Code, and so far as I know this section has never been construed.

CHIEF-JUSTICE BENNETT DELIVERED THE OPINION OF THE COURT.

The appellant was indicted, tried and convicted of the statutory crime of cutting and sawing off the brands of saw-logs. The indictment was signed by the foreman of the grand jury and returned into court and received by it. But it was not indorsed "a true bill."

Section 119 of the Criminal Code provides that the "concurrence of twelve grand jurors is required to find

Bacon v. Kentucky Central Railway Company.

an indictment; when so found, it must be indorsed 'a true bill,' and the indorsement signed by the foreman."

The provision of the Code *supra* is mandatory, not merely directory, that the indictment shall be "indorsed a true bill and signed by the foreman," which indorsement is the only legal and competent evidence that the paper filed is an indictment legally found; and unless it is so indorsed the paper is not an indictment legally returned into court and which the accused is not bound to answer. It is not a valid indictment, and it should have been dismissed upon demurrer.

The case is reversed, with directions to dismiss the indictment.

CASE 66—PETITION EQUITY—MARCH 13.

Bacon v. Kentucky Central Railway Co.

APPEAL FROM BOURBON CIRCUIT COURT.

OPTIONS—CONSIDERATION.—An optional agreement to convey, although without any covenant or obligation to purchase and without any mutuality of remedy, will be enforced in equity if it is made upon proper consideration or forms part of a lease or other contract between the parties that may be the true consideration for it.

Where it was stipulated in a lease of land to a railroad company that at the expiration of the lease the company should have the right to purchase the land at a certain price, the agreement was binding on the lessor, although there was no obligation upon the part of the lessee to purchase, the other undertakings of the lessee being a sufficient consideration.

WARD & DICKSON FOR APPELLANT.

1. The want of mutuality in the contract is fatal to its enforcement. (Litz v. Goosling, 14 Ky. Law Rep., 91; Boucher v. Vanbuskirk, 2 A. K. Mar., 345; Barbour v. Pate, 2 Mon., 8; Jones v. Noble, &c., 3 Bush,

95	373
106	458
95	373
125	501

95	373
130	481

Bacon v. Kentucky Central Railway Company.

697; *File v. Orr, &c.*, 8 Ky. Law Rep., 349; *Allen v. Roberts*, 2 Bibb, 98; *Smith v. Cansler*, 83 Ky., 368.)

Cases commented on: *Page v. Hughes*, 2 B. M., 439; *Bank of Louisville v. Baumeister*, 87 Ky., 6.

2. The contract was not assignable,
3. The defendant did not comply with the conditions to be performed by it, and hence is not entitled to a specific execution. (*Spalding v. Alexander, &c.*, 6 Bush, 167; *Story's Equity*, secs. 775, 742.)
4. The contract is one not capable of specific enforcement. (*Blanchard v. D., L. & L. M. R. Co.*, 18 Am. Rep., 149.)

GEO. C. LOCKHART FOR APPELLEE.

The option to purchase the leased premises at the expiration of the lease is based upon a sufficient consideration and is enforceable. (*Baumeister v. Bank of Louisville*, 87 Ky., 12; *Hawralty v. Warren*, 8 C. E. Green, 124; s. c., 90 Am. Dec., 613; *In re Hunter*, 1 Edw., ch. 1; *Welch v. Whelpley*, 62 Mich., 15; s. c., 4 Am. St. Rep., 810; *Davis v. Robert*, 89 Ala., 402; s. c., 18 Am. St. Rep., 126; *Suffrain v. McDonald*, 27 Ind., 269; *Waterman on Specific Performance*, pp. 267, 268 and 269; *Maughlin v. Perry*, 35 Md., 352; *Perkins v. Hasdell*, 60 Ill., 216; *Hare & Wallace's Leading Cases in Equity*, 4 Am. ed., vol. 2, p. 1090; *Boucher v. Vanbuskirk*, 2 A. K. Mar., 345; *Litz, &c., v. Goosling*, 14 Ky. Law Rep., 91.)

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

On the 17th of March, 1855, W. A. Bacon, the appellant, leased to the Covington & Lexington Railroad Company three acres of ground near Paris, Ky., for the term of ten years. The lessee agreed to fence off the ground into lots, keep it fenced, and only use the premises for cattle lots. Also to pass on its cars the lessor, while on his own business, and his wife and children, during the continuance of the lease. It further agreed that Bacon might put a pair of stock scales on the ground and use them, and would charge no freight for the transportation of the scales on its road, or of lumber to build an office or house for stockmen, and whatever sawdust was transported by the lessor for the shipment of stock from Paris was to be charged half freight.

Bacon v. Kentucky Central Railway Company.

This agreement was signed by both parties and put to record in the clerk's office of the Bourbon County Court. The lessee took possession of the ground and complied with the terms of the contract. On August 6, 1862, the lease was extended so as to run for twenty-five years from the expiration of the first lease, or until March 17, 1890, and was altered in boundary to some slight extent. It was also again stipulated that the lessee, then the Kentucky Central Railroad Company, should keep the ground fenced and use it for stock lots, and give Bacon a pass for himself and family on the railroad when traveling on his own business. There was, however, added to the lease the following clause, and out of it grows the present controversy:

"At the expiration of the lease, or upon the sale of said property by said Bacon, or in case of his death, the said company, by their authorized agent, shall have the right to purchase the said land now leased for the sum of one hundred dollars per acre, payment to be in cash at the time the deed is made and the land taken by said company. If after purchase the company shall decide to discontinue using said lots for stock purposes, the said Bacon, or his heirs, shall have the refusal to repurchase the same at the same price per acre for the land, and to pay for all improvements that may be put on said land, including the fencing, provided they agree to do so within ninety days after the same shall be offered to them."

This "extended" lease was also signed by both parties and put to record. Without disagreement of any substantial character, the parties continued under the contract—the lessor to obtain and use the passes, the half rates on sawdust, of which he was using large quantities

Bacon v. Kentucky Central Railway Company.

in the monopoly he had secured of "bedding" the cars of all stock shipped from Paris, etc., and the lessee to use the lot only for cattle lots, keeping the same fenced, etc., until on the 17th of March, 1890, and again on the 18th, the Kentucky Central Railway Company, as the successor of the Kentucky Central Railroad Company, tendered to Bacon the sum of three hundred dollars in payment for the ground embraced in the lease, and demanded a conveyance thereof under the terms of the contract. The latter refused to convey, and shortly filed his petition seeking to recover possession of the land and damages for its detention and use since the termination of the lease. The company defended its holding by virtue of the contract, alleged compliance with all its terms, which was denied by Bacon, and sought to compel a conveyance. The chancellor decreed specific performance and Bacon appeals. He contends that the contract is not enforceable because the lessee was not obliged, at the expiration of the lease, to perform the contract of purchase. The lessor, by tendering a deed to the company, could not have obliged it to pay the stipulated price of three hundred dollars.

To put the contention in another form, the contract, in so far as and inasmuch as it secures to the company a mere option to purchase the ground, is void for want of mutuality of obligation. It is argued that as both are not bound neither is bound. This doctrine, it is insisted, is borne out by the case of *Boucher v. Vanbuskirk*, 2 A. K. Mar. 345, decided by this court in 1820, and followed in *Barbour v. Pate*, 2 T. B. Mon., 8; *Jones v. Noble, &c.*, 3 Bush, 697, and finally in a pronounced and conclusive form in *Litz v. Goosling, &c.*, 93 Ky., 185.

On the other hand it is insisted that what is termed by the counsel of appellee as the more modern doctrine, that an optional agreement to convey without any corresponding agreement to purchase and without any mutuality of remedy, is enforceable in equity, if made upon proper consideration, or forms part of a lease or other contract between the parties that may be the true consideration for it, is authoritatively settled in the case of *Bank of Louisville v. Baumeister, &c.*, 87 Ky., 12, and clearly put in the case of *Hawralty v. Warren*, 18 N. J. Eq., 124 (s. c., 90 Am. Dec., 613), and in numerous other cases cited. A careful examination of these cases will, we think, fail to disclose any conflict between them. In the cases relied on by the appellant, the court finding in emphatic form a lack of mutuality of obligation and remedy, and no consideration whatever otherwise appearing, held this feature to be fatal to the enforcement of so "one sided" a contract. As we shall see, there must always be mutuality of contract, but the obligation to convey need not always be accompanied by an obligation to purchase—other consideration may make the contract mutually binding. In the *Boucher-Vanbuskirk* case *supra*, Vanbuskirk let to Boucher fifty acres of land adjoining other lands of the latter, upon which he might raise a house if he so desired, and might clear the land "without let or molestation, and enjoy the privileges of the same," and thereunto they set their hands and seals "the 9th of July, 1811," and then followed the agreement that if Boucher should pay to Vanbuskirk two dollars and fifty cents per acre the latter obligated himself to make the former a deed in fee for as much as he should pay, etc. The court announced the doctrine that "it is well settled that to enable either party

Bacon v. Kentucky Central Railway Company.

to compel a specific execution the contract must be mutually binding on each," and said that there was nothing to distinguish the case from "the naked case of an agreement binding on one party." The improvements mentioned, if any were put on the land by Boucher, and it was said that there was nothing in the record to show that any were erected, were made voluntarily. He was not bound to erect any, and it is noticeable that Boucher bound himself by the contract in no particular whatever, nor was there any consideration for the lease which could form the basis for the option to purchase. So in the cases of *Barbour v. Pate* and *Jones v. Noble, &c., supra*, there is nothing in either of the contracts, the enforcement of which was denied, distinguishing them from the "naked case of an agreement binding only on one side," and there was no consideration to uphold the contract for an option. In *Litz v. Goosling, supra*, Goosling and wife agreed "in consideration of one dollar to sell and convey unto E. H. Sudduth . . . with general warranty of title . . . all the coal in, upon and underlying a certain tract or parcel of land," etc. The court refused to enforce the contract because of a lack of mutuality of obligation, but said: "If the contract for an option to purchase real estate at a certain price within a certain time be based upon a sufficient consideration, which may consist, of course, either in an advantage moving to the one party or a disadvantage to the other, then it is enforceable; but where a mere naked option, destitute of consideration, is given to one, it is not enforceable, because there is no mutuality of right and remedy."

Turning from these cases where there was confessedly no sort of consideration to uphold the contracts, we notice

Bacon v. Kentucky Central Railway Company.

first the case of *Bank of Louisville v. Baumeister, &c., supra*. This court said: "It is true, as argued, 'a contract must be mutual, and one party can not be bound without the other.' But that does not mean that any one or more acts to be done by one of the parties must necessarily be simultaneous with the consideration paid or agreed to be paid by the other. The conveyance of the lot upon demand and tender of the agreed price by Spalding was obligatory upon Mrs. Bullitt, if at all, because it was part of the contract of lease, which being founded upon a valuable consideration, was valid and enforceable as an entirety. . . . We perceive no reason why the owner of unproductive real estate may not, as part of a contract of lease, and in consideration of rent to be paid by his lessee, or expense to be incurred in making it productive, as seems to be this case, bind himself to sell it within a prescribed period, at a stipulated price, at the option of the lessee." The same principle is determined in *Page v. Hughes*, 2 B. M., 439. In *Hawralty v. Warren, supra*, it is said: "These unilateral or optional contracts are not favored in equity, and it has been held both in Great Britain and this country, that want of mutuality of obligation and remedy is a bar to specific performance. (*Lawrence v. Butler*, 1 Schoales and L., 13; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch., 282 (7 Am. Dec., 427), etc.) But modern authorities have narrowed this doctrine down to cases in which there is no other consideration. And it is now well settled that an optional agreement to convey or renew a lease without any covenant or obligation to purchase or accept, and without any mutuality of remedy, will be enforced in equity, if it is made upon proper con-

Bacon v. Kentucky Central Railway Company.

sideration, or forms part of a lease or other contract between the parties that may be the true consideration for it. (*Hatton v. Gray*, 2 Ch. Cas., 164; *Backhouse v. Crosby*, 2 Eq. Cas. Abr., 32, par. 44; *Backhouse v. Mohun*, 3 John. R. [Swanst.], 434. . . .) In this case the agreement was executed at the same time with the lease, and was part of the same transaction, and must for this purpose be treated as if part of the lease."

In *re Hunter*, 1 Edw. Ch., 1, the court said: "In the next place, it is said the covenant to sell is not mutual, the lessee not being bound to purchase, and that as this is a 'one sided' agreement, the court will not decree a specific performance." But after discussing the authorities the learned vice-chancellor concluded thus: "The court may, therefore, in a proper case, where there is a covenant on one side and no mutuality, decree a performance. Besides, in a case like the present, it may be peculiarly proper. The rent may have been fixed at five hundred dollars as an inducement to the power of purchasing the property. This is a fair inference." To the same effect are the cases of *Davis v. Robert*, 89 Ala., 402 (s. c., 18 Am. St. Rep., 126); *Hall v. Center*, 40 Cal., 63, and *Souffrain v. McDonald*, 27 Ind., 269. In the last-named case the court said: "Numerous authorities are cited upon the point that a mere offer to sell may be withdrawn at any time before it is accepted. That such is the law can not be controverted. But the agreement under consideration is not a mere naked proposition to sell the lot, nor can it be regarded as separate and distinct from the lease of the lot and the consideration stated in the agreement. The stipulations on the one side to lease the lot for a period of

Bacon v. Kentucky Central Railway Company.

two years, with the right of the lessees within that time to purchase the same at the price and on the terms stated in the agreement, and on the other to pay the rent agreed upon, and to erect the fence, must be regarded as constituting one entire agreement, each particular stipulation forming an inducement thereto. The agreement to pay the rent and build the fence must be deemed to have been made in consideration as well for the privilege of becoming the purchasers of the lot as for its use."

Mr. Waterman in his work on Specific Performance of Contracts (page 269) lays down the same rule. "The mutuality and consideration," says that author, "consist in the fact that the vendee has done, upon the promise of the vendor, what the latter required, and it is immaterial that it was done without entering into a previous undertaking to do it."

In the case under consideration, the company, for the use of three acres of unimproved ground, and the right to buy it at the end of the lease for three hundred dollars, agreed to pay or furnish to the appellant free travel on its cars for himself and family, haul the sawdust needed by him in bedding the cars for stock at half price, fence off the ground into subdivisions for cattle lots, and keep the same fenced, and, what was by no means an unimportant feature of the contract, retain and use the premises for stock lots. We say this latter was no unimportant part of the consideration, because we gather from the contract referring to the appellant's use of sawdust, and which is made clear from the proof, that the chief point in view with Bacon was to have the company use his grounds as its stock lots, and thus secure the right to "bed" the cars,

Bacon v. Kentucky Central Railway Company.

the average yearly profit from which business, continued throughout the whole of the lease, was from six hundred to eight hundred dollars. We can not say that the consideration furnished by the lessee was solely for the use of the ground. We must conclude that each and every stipulation on the part of one of the contracting parties is supported by and induced by each and every stipulation on the part of the other. We may read the contract as if by it the lessee agreed to perform the stipulations required of him provided, or on condition, that he thus secured by purchase, for a valuable consideration, the right or option to buy, and when the contract is so considered, we find no authority in this State or elsewhere which induces us to sacrifice the equity of enforcing the agreement to the somewhat ambiguous, though euphonistic, doctrine of "mutuality and reciprocity of obligation."

On the issues of fact presented, we think the lessee furnished and the lessor received in every substantial particular the services undertaken to be furnished under the contract. The benefits accepted by the lessor under the agreement were received throughout a period of some thirty-five years, and he will not now be heard to say "my passes were in an unsatisfactory form; I paid full freight for my sawdust, and was put to the slight inconvenience of waiting a few days for the rebate; I got passes only over the road as it was constructed when the contracts were made, and was not allowed to ride free on other lines of the company in the various States of the Union where the road has eventually been extended; I accepted the benefits secured under the contract, but it now occurs to me that the lease and option was a personal contract

Newsome v. Newsome.

and not transferable, and I ought not to have accepted, and had no legal right to accept, the service from any save the original lessee."

These considerations were properly dismissed by the chancellor as insufficient to prevent an enforcement of the contract. The judgment is therefore affirmed.

CASE 67—PETITION EQUITY—MARCH 17.

Newsome v. Newsome.

APPEAL FROM BRECKINRIDGE CIRCUIT COURT.

1. **DIVORCE AND ALIMONY.**—The provision of the statutes denying alimony to the wife, except "on a divorce obtained by her," was intended to apply only in that class of cases where a divorce obtained by the husband involves fault of the wife, and not in cases where either party may maintain the action without reference to which is in fault. Therefore the wife was entitled to alimony in this case, although the divorce was obtained by the husband, the divorce being granted upon the ground that the parties had lived apart five years. And where the divorce is granted upon such a ground the husband should be required, as was done in this case, to pay costs of each party without inquiring whether the wife is in fault.
2. **SAME.**—It would be oppressive in this case to require the husband to pay for the support of the wife \$400 annually during her life or widowhood, as she may in due course of nature live unmarried twenty years, while he can not be reasonably expected to earn money by his own labor more than a few years longer. He should, therefore, be permitted to pay whatever may be amount of allowance in a gross sum, and in a reasonable time; and under all the circumstances and in view of what he has already paid by order of court, the sum of \$1,000, payable as of the date of the judgment appealed from would be reasonable, the estate of the husband, consisting of houses and lots, being worth about \$20,000, and the wife owning property given her by the husband worth \$2,500, and also \$500 in money.

MORRIS ESKRIDGE FOR APPELLANT.

1. The wife is not entitled to alimony upon a divorce granted to the husband.

95	383
105	628
105	641
95	383
114	531

95	383
136	74

Newsome v. Newsome.

2. The wife is not entitled to alimony where she is in fault. (*Griffin v. Griffin*, 8 B. M., 120; *Cravens v. Cravens*, 4 Bush, 437; *Orr v. Orr*, 8 Bush, 160; *Boggess v. Boggess*, 4 Dana, 308; *Hulett v. Hulett*, 80 Ky., 365; *Beall v. Beall*, 80 Ky., 676; *Butler v. Butler*, 2 Litt., 201; *Logan v. Logan*, 2 B. M., 142; *McCrocklin v. McCrocklin*, 2 B. M., 270; *Williamson v. Williamson*, 12 B. M., 270.)
3. Even if the wife was entitled to alimony the amount allowed is too large.

SPRIGG & CHELF FOR APPELLEE.

The appellee is entitled to alimony, and the amount allowed is not only not too large, but should be increased. (2 *Bishop on Marriage and Divorce*, secs. 1006-1008, 1017, 1029, 1080, 1083, 1084, 1087; *Fisher v. Fisher*, 2 Litt., 387; *Thornsberry v. Thornsberry*, 4 Litt., 252.)

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

Appellee, Annie Newsome, brought this action for divorce from bed and board for alleged cause of habitual behavior toward her by the husband, Robert L. Newsome, for not less than six months, in such cruel and inhuman manner as indicates settled aversion to her. But he made his answer a counter-claim, asking judgment for absolute divorce for the cause they had lived apart without cohabitation for five consecutive years next before the application.

The lower court dismissed her petition, but rendered judgment for divorce as prayed for in his counter-claim. It was, however, further adjudged that he pay \$100 fee of her attorney in the action, also \$400 annually during her life or widowhood as alimony; and from that part of the judgment he has appealed.

Section 28, chapter 26, General Statutes, provides that "in actions for alimony and divorce the husband shall pay costs of each party unless it shall be made to appear in the action the wife is in fault and has ample estate to pay the same." And section 6, article 3, chapter 52, con-

tains this provision: "If the wife have not sufficient estate of her own she may, on a divorce obtained by her, have such allowance out of that of her husband as shall be deemed equitable."

It will be observed that in the first section quoted one of the conditions of requiring the husband to pay all costs is that *it does not appear the wife is in fault*, while it is provided in the other that an allowance for alimony can be made *only on a divorce obtained by her*. And the question arises whether either proviso has application in a case like this.

Section 1. article 3, chapter 52, provides that for two special causes a divorce may be granted to both husband and wife: (1) Such impotency or malformation as prevents sexual intercourse (2) Living apart without cohabitation for five consecutive years next before application. But all other causes are therein classified thus: (1) Causes for which the party *not in fault* may have a divorce, such as adultery, abandonment, etc. (2) Causes for which the wife, *when not in like fault*, may have a divorce; such as confirmed drunkenness, lewd behavior, etc. (3) Causes for which the husband may have a divorce; as when the wife is pregnant by another man, without the husband's knowledge, at time of marriage, or when she is guilty of such lewd behavior as proves her unchaste.

Existence of each one of the causes so classified necessarily involves fault on part of the defendant in an action for divorce, and neither husband nor wife can maintain an action for any one of these causes if in like fault. But either may sue for and obtain a divorce by simply alleging and proving the fact they have lived apart,

without any cohabitation, for five consecutive years—no judicial investigation respecting cause of separation, nor inquiry as to who is in fault, in meaning of the statute, being required in order to determine the right to divorce.

It therefore seems to us, giving the statute a reasonable construction, the husband is required, in a case like this, to pay costs of each party without inquiring whether the wife is in fault. And as it is well settled an allowance for services of the wife's attorney, when legally authorized, may be taxed as costs, and no complaint is or could be fairly made the amount is excessive, it was not error to make it.

It seems to us equally manifest that provision of the statute denying alimony to the wife, except "on a divorce obtained by her," was intended to apply in that class of cases where a divorce obtained by the husband involves fault of the wife, not in cases like this, where, as either may maintain the action, it is not a material or legitimate inquiry, in determining the right, who is in fault.

The evidence shows the husband possessed of an estate worth about \$20,000, consisting of houses and lots, rents from which, added to what he earns otherwise, make a yearly income of from \$1,000 to \$3,000, there being much conflict of testimony on the subject. The wife owns a lot upon which are two dwelling-houses, worth about \$2,500, heretofore purchased for her by the husband; she has also about \$500 in money.

The children are all of full age, and none of them, except the youngest daughter, who lives with her father, are dependent upon him for support.

In our opinion it would be oppressive, and probably in the end ruinous, to require appellant to pay \$400

Fuqua & Smith v. Massie & Sons.

annually during appellee's life or widowhood. For she may, in due course of nature, live unmarried twenty years, while he can not be reasonably expected to earn money by his own labor more than comparatively a few years longer, thus taxing his houses, that will constantly need repairs and may deteriorate, for the entire allowance. He should, therefore, be permitted and required to pay whatever may be amount of allowance in a gross sum and in a reasonable time; and we think, under all the circumstances and in view of what he has already paid by order of court, the sum of \$1,000, payable as of the date of the judgment appealed from, would be equitable.

Wherefore the judgment is reversed and cause remanded for proceedings consistent with this opinion.

CASE 68—PETITION ORDINARY TRANSFERRED TO EQUITY—
MARCH 17.

Fuqua & Smith v. Massie & Sons.

APPEAL FROM DAVEISS CIRCUIT COURT.

1. **PARTNERSHIP.**—The fact that one is to receive a certain part of the profits of a business in consideration of his services, and also in consideration of his furnishing a house in which to carry on the business, does not constitute him a partner.
2. **MASTER AND SERVANT—LIABILITY OF SERVANT FOR BREACH OF CONTRACT.**—Where an employe by his dishonest practices compels his employer to discharge him, he is to be treated as having voluntarily refused to comply with his contract, and is liable in damages to his employer for the breach of contract.

C. S. WALKER FOR APPELLANTS.

1. The court was right in deciding that appellants and appellees were not partners in the tobacco, but was wrong in holding that they were

95	387
103	325
95	387
110	225

Fuqua & Smith v. Massie & Sons.

- partners in the commissions. (1 Bates on Partnership, secs. 1, 17, 19, 20, 21, 22, 23; Beecher v. Bush, 45 Mich., 188; s. c., 40 Am. Rep., 468; Boston & Colorado Smelting Co. v. Smith, 13 R. I., 27; s. c., 43 Am. Rep., 7; Babcock & Son v. Deposit Bank, 5 Ky. Law Rep., 516; Donley v. Hall & Long, 5 Bush, 549; Lafon v. Chinn, 6 B. M., 806; Heran v. Hall, 1 B. M., 159; Russell v. Gray's Ex'or, 4 Ky. Law Rep., 619; Barghman v. Portman, 12 Ky. Law Rep., 342; 17 Am. & Eng. Ency. of Law, p. 834.)
2. The court erred in allowing appellees to recover as if they had fully performed their contract, or rendered the services stipulated, and basing their compensation upon the amount of tobacco actually put up by appellants, although they had rendered no service or assistance in putting it up. Appellees, if entitled to anything on account of services, can recover compensation only for the value of their services actually rendered, subject, by way of recoupment, to the damages sustained by appellants by the former's breach of duty in their employment, which not only justified the discharge, but made it necessary. (Wood on Master and Servant, pp. 166, 221, 222, 210, 252; 14 Am. & Eng. Ency. of Law, pp. 788, 789, 790, 793, 794; Gen. Stats., chap. 112, sec. 5; Foster v. Watson, 16 B. M., 384; Whitaker v. Sandifer, 1 Duv., 262; Western v. Sharpe, 14 B. M., 178; 2 Sutherland on Damages, pp. 454, 455, 456, 457, 468, 469, 476, 477, 473, 474; 2 Sedgwick on Measure of Damages (7th ed.), pp. 82, 83, 84; Jewell v. Thompson, 2 Litt., 52; Wright v. Wright, 1 Litt., 179; Morford v. Ambrose, 3 J. J. Mar., 688; McLure v. Rush, 9 Dana. 65; Taylor v. Patterson, 9 La. Ann., 251; Escott & Son v. White, 10 Bush, 172; Hill & Perkins v. Hager Bros., 7 Ky. Law Rep., 518, 519.)

SWEENEY, ELLIS & SWEENEY FOR APPELLEES.

No brief in record.

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

The appellants, Fuqua & Smith, made this contract with John Massie & Sons: "Whereas, Fuqua & Smith have secured an order for 400 or 500 hogsheads of strips, to be put up in Owensboro, Ky. Now, in consideration of John Massie & Sons leasing to Fuqua & Smith their tobacco factory in the suburbs of the eastern part of Owensboro, and the further consideration of their putting in their services to assist in the purchase and putting up said tobacco, the said Fuqua & Smith agree to give them

Fuqua & Smith v. Massie & Sons.

(John Massie & Sons) one half interest in the commissions on putting up said tobacco, after paying all expenses.

“Said Massie & Sons agree that Fuqua & Smith shall take the prior leaf and lugs of their purchase already received at cost originally paid by them, and Fuqua & Smith are to have the entire charge and management of the purchase and handling of said tobacco; and they are to assume the outstanding contracts of John Massie & Sons on all prior tobacco they may have contracted for in the county and not yet delivered.”

This contract was evidenced in writing on the 1st of April, 1889, although entered into shortly before that date. On the 7th of August of that year, Massie & Sons brought this action to recover on the tobacco sold the appellants under the contract, and also the value of some tobacco they had raised, as well as to recover damages for other breaches of the contract by the appellants, the main breach alleged being the discharge by the appellants of the appellees from their service, and their refusal to allow the appellees to assist in purchasing and putting up the 400 or 500 hogsheads of strips, for which the appellants were to allow the appellees one half the commissions that amounted, as is alleged, to \$3,675—their half.

It is averred, and the proof shows, the appellees were discharged from the service of the appellants on the 18th of May, 1889, long before the tobacco was put up in hogsheads so as to comply with the order, and they are, therefore, claiming their right to the profits upon the terms set forth in the contract; alleging that their discharge was without cause, and averring a readiness on their part to comply with the agreement. The defense, or that

principally relied on, in regard to the tobacco of the appellees hanging in the barn at the time of the purchase, is that the tiers of tobacco on the outside of the barn were filled with good tobacco, and on the inside the tiers were filled with an indifferent quality of tobacco; that the tobacco at the time of the purchase was very dry and could be examined only on the outside, the plaintiffs (appellees) representing that it was all of a like quality, when they knew the tobacco on the inside was of an inferior quality: that the appellants relied on the representations of the appellees as to the quality of the tobacco on the inside of the barn or beyond the front tiers, and made the purchase upon the belief and the representations of the appellees that the tobacco to be seen was a fair average of the quality.

As to their refusal to permit the appellees to remain in their service, or to comply with their agreement to fill the order for the 500 hogsheads of tobacco, the appellants say they discovered the appellees, who were receiving and weighing the tobacco as delivered, were knowingly using false weights for the purpose of defrauding their partners or those of whom the purchases had been made, giving them less weights than they were entitled to, etc.

The action was brought at law and transferred to equity, with the affirmative allegations of the answer traversed by the appellees.

The chancellor, upon the hearing, found as to the tobacco in the barn at the time of the purchase, "that the representations made by the appellees as to the quality were false and fraudulent, and not being in a condition to be examined by the appellants, they relied on the representations of the appellees, and the appellees should ac-

count for the difference in the value as represented and as it was in fact." He fixed the value at \$3.25 per hundred, and in that conclusion we concur, it being amply sustained by the testimony. The appellants had paid \$5,000 on the tobacco, and at \$3.25 per hundred, there was an excess in payment of \$1,212.88.

He also adjudged the appellees used false weights, or loaded peas, in weighing and receiving the tobacco, and when discovered the appellants discharged them and ceased to buy tobacco to be handled in the factory. The court further adjudged that the commissions to be paid by Bird & Co. to the appellants, under the order, were \$2.50 per hundred pounds, and as appellants had stemmed or prepared 308,610 pounds, on which they made \$3,600.25, the appellees were entitled to one-half.

The court below concluded that the appellees and the appellants had embarked in a joint enterprise, and the interest the appellees had in it was still retained, or not forfeited, by reason of their discharge on account of their fraud and dishonesty in using false weights; that their discharge, however, ended all obligation on the part of the one to the other as to the performance of the contract, and while the appellees were entitled to their half commission, less the cost of putting up the tobacco, they were not liable in damages to the appellants for a failure to render the personal services agreed upon by the contract.

It is proper to determine first the interest the appellees had in this contract. They were certainly not partners in the tobacco, as the court properly adjudged, nor were they partners in the commissions, but were entitled to a half interest in the commissions as a compensation for

Fuqua & Smith v. Massie & Sons.

their services and the use of their tobacco factory. Their right to the one-half commission depended on the performance of the services they had agreed to render, and failing to render this service, they are entitled to a reasonable rental for the use of their factory so long as appellants used it, and to the value of their services actually rendered, less the damages, if any, the appellants sustained by reason of their abandoning the contract. The pleadings make this issue, and the fact the appellees were ready and willing to perform the service when properly discharged by the appellants, affords no reason for denying to the appellants the right to recover for the failure of the appellees to perform the services.

The chancellor, in his judgment below, gives to the appellees either a joint or partnership interest that can in no manner be lessened except by deducting the actual cost of putting up the tobacco, and if this is the proper version of the contract, he is undoubtedly right; but we think it manifest that the one-half commission was intended as compensation only for the use of the warehouse and for the personal services to be rendered, and if no services had been rendered, the only recovery would be for the use of the factory, less the damages sustained by reason of the failure to perform the services.

The appellees had no interest in the tobacco. Their credit was in no wise involved. They had sold their tobacco to the appellants—not only the tobacco in the warehouse, but that they had purchased and had not been delivered. The appellants had the entire charge and management of the purchase and handling the tobacco, and the appellees were only employes, at one-half of the commission, to be paid when they did what they agreed to do.

Fuqua & Smith v. Massie & Sons.

It was not intended by any of the parties to form a partnership. The appellees were not principals in the undertaking, but were to receive half commission in reward for services.

"It is well established," says the court, in *Loomis v. Marshall*, 12 Conn., 69, and other cases, "that a party who stipulates to receive a sum of money in proportion to a given quantum of profits as a consideration for his labor, is not chargeable as a partner." (*Denny v. Cabot*, 6 Met., Mass., 82.) In *Bradley v. White*, 10 Met., Mass., 303, where one agreed to pay all expenses and furnish the goods, and the other agreed to carry on the business for one-half the profits as compensation, it was held that no partnership existed; and while the facts of that case might well evidence a partnership as to third parties, yet, as between the parties to the agreement, no partnership was intended; and the case before us manifests such a plain purpose as between the parties to give to the appellees as compensation only the one-half commission for services, that it is needless to pursue the inquiry further. It is insisted, however, that as the appellees were always ready to perform the services, that no damages can accrue to the appellants, as they voluntarily caused the appellees to abandon their agreement or refused to permit them to perform it.

We perceive no difference between a case where a party of his own volition refuses to comply with his contract, and a case where, by his fraudulent conduct in its performance, he compels his employer to discharge him. In *Wood on Master and Servant*, page 221, it is said: "The very nature of the relation imports trust and confidence, and its evident purpose is the advancement of the master's

interests and profits by the servant's labor; therefore, if the servant violates this trust and confidence, or willfully does anything detrimental to the master's interests, or which involves him in loss, it is a breach of the contract which justifies his instant discharge," etc.

These appellees have violated their contract by such fraudulent conduct as compelled the appellants to discharge them. Their conduct was a more palpable breach than if they had abandoned their labor without any cause whatever. There was no voluntary discharge by the appellants, but they were compelled to require the appellees to leave their employ by reason of appellees' dishonest practices, that must have affected their business; and it is evident the right to recover damages exists, but to what extent is a question not involved here.

Whether this action, in so far as it attempts to recover for services, can be maintained at all upon the facts of this case, is one of grave doubt, but as the appellees are entitled to rent for the use of their building, it may not be improper to hear the case upon the question as to the value of the services, less the damages sustained by the breach of the contract on the part of the appellees. The value of the services only up to the date of the discharge, and the use of the warehouse as long as the appellants occupied it, are the questions to be determined, subject to the claim for damages by the appellants on account of the breach. These questions are remanded to the chancellor.

The judgment below is reversed for proceedings consistent with this opinion. Affirmed on cross-appeal.

Jones, &c., v. Bigstaff, &c.

CASE 69—PETITION EQUITY—MARCH 27.

Jones, &c., v. Bigstaff, &c.

APPEAL FROM MONTGOMERY COURT OF COMMON PLEAS.

1. **PARTITION.**—Where land was divided under order of the county court and the report of division confirmed, each owner taking possession of the share allotted him, although deeds of partition were never executed, the division must be regarded as effective as if a grant had been expressly made by the one owner to the other.
2. **IMPLIED WARRANTY—CONTRIBUTION AMONG DEVISEES.**—Where one of several joint devisees loses by paramount title a part of the estate devised, he is entitled to contribution from the other devisees, and this implied warranty of title passes to his heir; but it does not pass to one to whom he sells the devised land, and therefore where such a purchaser loses the land by paramount title, he can not look to his vendor's co-devisees for contribution.
3. **SAME.**—Where the right to contribution exists it includes not only the value of the land recovered but the expenses of the litigation.
4. **SAME—LIMITATION.**—The right to contribution does not exist until there is an eviction, and limitation does not begin to run until then.
5. **SAME.**—In this action for contribution, all the devisees not being parties to the action, each defendant is liable only for his part upon the basis that all are solvent and able to contribute.

Z. T. YOUNG AND WM. H. HOLT FOR APPELLANTS.

1. In this country it is the rule in case of a partition by a court, although no deeds be made, that there is an implied warranty of title, and it is not broken until eviction, and limitation does not begin to run until then. (Walker v. Hall, 15 Ohio St., 355; Dugan v. Hollins, 4 Md. Chy., 189; 17 Am. and Eng. Ency. of Law, p. 784, and authorities there cited; Venable, &c., v. Beauchamp, 3 Dana, 321.)
2. There must be restitution to the extent of the failure of consideration. In this case it would be the value of the land at the time of the partition and interest, because in the exchange land of that value was given for it. (Robertson v. Lemon, 2 Bush, 301.)

In addition the party recovers the legal costs in resisting eviction and a reasonable attorney's fee.

STONE & SUDDUTH FOR APPELLEES.

1. Although there was an implied warranty to the original joint tenants in the division, yet that warranty did not run with the land so as to be cast either upon the heir or upon the vendee of the original co-tenant,

Jones, &c., v. Bigstaff, &c.

James R. Jones. (Venable v. Beauchamp, 3 Dana, 322; 1 Washburne on Real Property, 4th ed., p. 689; Coke on Littleton, vol. 2, top page 363, note 2; Rawle on Covenants for Title, pp. 461, 470, 472, 476.)

2. The implied warranty was broken when the partition was made, because the title to the Tydings' land was defective, and the statute of limitations began to run in April, 1851, and the bar was therefore complete when this suit was brought. (Wood on Limitation, p. 319; Scott v. Scott, 2 A. K. Mar., 219; Payne v. Rodden, 4 Bibb, 304; Pusey's Trustee v. Wathen, 90 Ky., 473.)

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

John Jones, a resident of Bath County, died testate in March of the year 1851. He owned a large tract of land, and in the month of November of the same year (1851) a division of this land was made between his children under an order of the Bath County Court. The report of division was confirmed, but no deed of partition was executed by the parties, but each child took possession of his allotment, and the division must be regarded as effective as if a grant had been expressly made by the one to the other.

The testator left five children and two grandchildren, the children of his deceased daughter, Polly Jones. In the partition there was allotted to James R. Jones, one of the children, and who was the father of these appellants, three hundred and sixty-six acres and two roods of land; Nancy Jones, the widow of the testator, got three hundred and five acres as her share; David L. Jones, three hundred and thirty acres; Lydia Boyd, three hundred and one acres; Thomas Jones, three hundred and thirty-five acres; Elizabeth Bridges, three hundred and fifty-four acres, and the children of Polly Jones three hundred and thirty-two acres. James R. Jones, who obtained in the partition three hundred and sixty-six

acres of land, died in the year 1859, leaving children, some of whom are the appellants in this case.

In the tract of land of three hundred and sixty-six acres allotted to James R. Jones, was embraced land that was claimed by the heirs of one Tydings, and in the year 1868 the heirs of Tydings brought an action to recover it, and Daniel R. Jones, the principal appellant here, was a defendant to that action. His father, James R. Jones, had, by a regular conveyance in his lifetime, sold to his son, Daniel R. Jones, one hundred and seventy-five acres of this land, the title to which was in dispute; and Daniel R. obtained fifty acres and a fraction, by inheritance from his father, that was included in the original partition that was also in dispute.

The action instituted by the heirs of Tydings against Daniel R. Jones and others ended in the year 1881 in a recovery by Tydings' heirs of the one hundred and seventy-five acres conveyed him by his father, and of the fifty acres that he had inherited from him and that had been allotted to his father in the original partition between the heirs or devisees of John Jones.

The present action was instituted by Daniel R. Jones and James M. Jones, his brother, to recover, by way of contribution from the original partitioners under the will of John Jones, their proportion of the loss sustained by reason of the recovery of this land by Tydings' heirs, James M. Jones having lost in the recovery fifteen acres that had been allotted in the original partition. Their action was dismissed.

The contention of the appellees is: (1) That James R. Jones, the father of the appellants, and one of the original partitioners, by a verbal agreement with the other

Jones, &c., v. Bigstaff, &c.

devisees under the will of John Jones, agreed to risk the title upon their giving him more land than was allotted the other devisees, knowing at the time the defect in the title. (2) They can not maintain the action because the implied warranty arising from the partition does not run with the land, and operates only as between the original parceners or tenants, that gives the right to a redivision and nothing more. (3) The statute of limitations that began to run as soon as the partition was made and confirmed.

As to the first ground of defense relied on, it is sufficient to say, if otherwise available, it is not sustained by the testimony, the proof conducing to show the land of the appellants' father was of no greater value than that allotted the other devisees, with other testimony showing that while the defect in the title was talked of, it was at the time supposed that the co-devisees, if the land was lost, would be liable to contribute. There is nothing in this defense.

The second and third grounds of defense are questions of more importance, and have not been heretofore decided by this court. Section 6 of chapter 23, General Statutes, provides: "When any real or personal estate shall be devised to any one of the heirs-at-law of the testator, and the title to the same, or any part thereof, shall prove invalid, such devisee shall have contribution from the others, unless it shall appear from the will that such was not the intention of the testator." By reason of this statutory regulation, as well as the rule of equality recognized by courts of chancery, one of these joint devisees losing a part of the estate devised, by a paramount title, would be entitled to contribution from the others, and

the question as to whether an alienee from one of the devisees can recover contribution of the original devisees under this implied warranty of title to his vendor, arising from the partition, must first be determined.

The appellant, Daniel R. Jones, purchased from his father one hundred and seventy-five acres of this land recovered by the Tydings, and obtained his father's deed with a warranty of title. James M. Jones sold his right, he having lost nineteen acres, and his vendees are not before the court.

It is maintained by counsel for the appellants that an implied warranty of title arising by operation of law, or from the statute, upon the making of a partition by the judgment of a court of competent jurisdiction, like an express covenant of warranty, runs with the land, and therefore the alienee of one partitioner or one of the tenants in common, when rightfully evicted, may maintain the action for contribution.

In *Venable, &c., v. Beauchamp*, reported in 3 Dana, 321, it is said: "To every partition of land the law annexes an implied warranty, whether expressed in the deed or not." Each partitioner becomes the warrantor of the other; but, as said in the case cited, the warranty in such cases is special, not only with regard to the person or persons who may take advantage of it, but also with regard to the amount of recompense.

Under the common law rule there was no such doctrine as that of an implied warranty as between joint tenants and tenants in common, because they could not be compelled to make partition, and when making voluntary partitions there was no reason why they could not contract for themselves and insert express warranties to secure

Jones, &c., v. Bigstaff, &c.

them against loss by a paramount title; but in case of co-parceners a partition could be compelled, and therefore the implied warranty arose, by operation of law, for the protection of the parceners.

In this State a division could be compelled, although the devisees held as purchasers, and this division was had under an order of court with the jurisdiction to require the division in opposition to the wishes of every one of the devisees. And to what extent this implied warranty goes when the tenancy is severed, whether the parties are co-parceners, joint tenants or tenants in common, is the question.

Does the privity exist between the heirs of one of the tenants, dead, and the surviving tenants, and does it extend further and authorize a recovery by the vendee of one of the tenants after partition and an eviction by a superior title? Where the tenant, whether holding as a co-parcener, joint tenant or in common, dies, his right as against his co-tenants with reference to the joint title to land passes to the heir, either for the purpose of demanding partition or exacting contribution where there has been a partition and an eviction. The privity of estate is not destroyed by the death of one of the tenants whose right and title pass by operation of law to his heirs. Their right to recover, if the ancestor could, is not doubted, but we can not well see how the implied warranty passes to the alienee or vendee.

The conveyance severs the relation and places the parties in a position where neither the co-tenant or his vendee can demand a redivision. The law creating the division provides against loss by the implied warranty, but this extends only to the parties and their heirs and

not to those who become purchasers, after division, from one of the joint holders. He must secure himself by his contract—his covenant of warranty—as an implied warranty runs only in favor of the tenants and their heirs. The remedy, where loss is sustained, is by a re-division or by compensation in value for the actual loss. This would embrace the value of the land and the expenses of the litigation.

In a well-considered case, reported in 8 Humph., 280 (*Sawyers v. Cator*), Turly, Justice, says: "This implied warranty holds only in privity of estate, and therefore if either parcener aliens in fee and the alienee is evicted, the aliening partner can not enter on the other allotment, because by the alienation she has dismissed herself from having any part of the tenements as parceners by thus severing the connection which previously existed."

That case also establishes the doctrine that an alienee from one tenant may be entered upon by a co-tenant who has sustained loss, for the reason that if such a rule was not recognized it would place it within the power of the parcener to defeat the remedy by making a conveyance of his parcel. That question, however, is not here.

It is well settled that parties to a partition, whether co-parceners, joint tenants or tenants in common, are liable upon an implied warranty of title when loss occurs after partition, and that this implied warranty does not, like an express covenant, run with the land. In this case the appellant, Daniel R. Jones, being a purchaser from his father of one hundred and seventy-five acres of this land, can not recover on the implied warranty created by operation of law, on the division of the land of John Jones between his devisees, the father of the

Jones, &c., v. Bigstaff, &c.

appellant being one of them; nor can James M. Jones, another appellant, recover, because he has sold his interest. Then, as to the fifty acres and a small fraction inherited by Daniel R. Jones from his father, as that was a part of the allotment to the latter (his father) in the division of the land of John Jones, it follows a recovery may be had. It has been lost by a paramount title, and as an heir of James R. Jones, the appellant, Daniel R. Jones, is entitled to its value at the date of the division.

It is said, however, that the statute of limitations is a bar to the recovery, and this case is said to be analagous to implied warranties in the sale of personalty. We think not. The implied warranty of title as to personalty is broken from the sale and delivery if no title exists; and while in cases of an express warranty, whether as to personalty or realty, the covenant is not broken until there is a recovery in the one case and an eviction in the other by a superior title, still the application of the same rule in regard to the limitations of actions for both realty and personalty is not sustained either by precedent or by any statutory regulation, and if, as the authorities all say, the implied warranty is for the protection of those compelled by law to make division, that protection is needed in cases of the partition of realty when an eviction takes place.

The right to contribution never existed until the recovery by Tydings' heirs on a better title. As to the fifty acres of land, each devisee should contribute his part of the loss; but as all of them are not before the court, only those defendants to the action can be compelled to contribute, and then each only his part, on the basis that all are solvent and able to contribute. They are also

The Coleman-Bush Investment Co. v. Figg, Trustee.

liable for their part of the expenses in the proportion that the fifty acres will bear to the entire number recovered. The case of *Sawyers v. Cator*, 8 Humph., 280, determines the question of limitation also.

This court has heretofore had the case of *Tydings'* heirs before it. Their right of recovery was clearly established, and the case made out for the appellant, D. R. Jones, to the extent indicated.

The judgment is affirmed as to James M. Jones and reversed as to Daniel R. Jones, with directions to render a judgment in accordance with this opinion.

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CASE 70—PETITION EQUITY—MARCH 27.

The Coleman-Bush Investment Co. v
Figg, Trustee.

APPEAL FROM JEFFERSON CIRCUIT COURT.

1. **CONSTRUCTION OF DEVISE—"SURVIVORS."**—The word "survivor" is a flexible term, and in determining whether as used in a will it is to be interpreted according to its strict and literal meaning, or so extended as to include the children of one who, if living, would be within its literal meaning, the intention of the testator, as gathered from the spirit and context of the will, must control.

Under a devise by a testator to several grandchildren, with the provision that if any of them should die without issue then living, his interest should go to the "survivor or survivors of them," upon the happening of the contingency the interest of the one dying will go to the survivors to the exclusion of the children of the one who may be dead, it being further provided that if all should die without issue living at the time, the property shall go to the testator's surviving children "and the issue of such of them as now are or may then be dead."

2. **DEFEASIBLE FEE.**—Under such a devise the grandchildren take a defeasible fee, and all of them having united in a conveyance of the land devised by which they relinquish all right and title to the land as survivors, if the estate vested in any one of them should be defeated by

The Coleman-Bush Investment Co. v. Figg, Trustee.

the happening of the contingency mentioned in the will, the grantee acquires the fee, subject to be defeated (if at all) only in the event all the grantors shall die leaving no issue. As the children of the grantors can never take as "survivors," their failure to unite in the conveyance can not affect the title of the grantee.

8. **SALE BY TRUSTEE** — Where a husband conveyed land to a trustee for the use of his wife for life, remainder to their children, if any, and if not, to the grantor, with power to the trustee to sell and make a good title to the purchaser by the written consent of the wife, and to dispose of the purchase money as she might order in writing, the trustee named in the deed having resigned and a new trustee having been appointed in his stead, a contract for the sale of the land made by the new trustee and the wife will be enforced by the chancellor, as the wife has, by uniting in a conveyance with the trustee and her only child, given her consent in writing, and the husband has by tendering a deed confirmed her action. And while no power to sell under the provisions of the deed was conferred upon the new trustee at the time of his appointment, yet this power can be given as well after as at the time of the appointment, and this the chancellor has done by enforcing the contract.

JAMES H. BOWDEN FOR APPELLANT.

The appellant prefers to take the land if the appellees can make a good title. This appeal is taken only because it fears.

1. The devise to the three children of David is a fee defeasible. (*Varble v. Phillips*, 14 Ky. Law Rep., 363; *Hart v. Thompson*, 3 B. Mon., 488; *Deboe v. Lowen*, 8 B. Mon., 620.)
2. Who are included in "survivor or survivors"? See *Carter v. Bloodgood*, 3 Sandf., 293.
3. Can the issue of the three grandchildren ever claim as purchasers? See *Jackson v. Blanshan*, 3 Johnson, 292; s. c., 3 Am. Dec., 485; *Jackson v. Staats*, 11 Johns., 337; s. c., 6 Am. Dec., 876; *Sinton v. Boyd*, 19 Ohio St., 80; s. c., 2 Am. Rep., 369; *Deboe v. Lowen*, 8 B. Mon., 620; *Attorney-General v. Wallace*, 7 B. Mon., 616; *Moore v. Howe*, 4 Mon., 219.
4. It seems clear that the brothers and sisters of David, and their descendants, can claim only when there is no longer any descendant of David living, and that this condition must exist when the last of the three grandchildren dies.
5. It seems that the substituted trustee has the same power that the original trustee had to convey and thus cut off all remainders created by the deed of trust.

BARNETT, MILLER & BARNETT AND L. H. NOBLE FOR APPELLEES.

1. By the exercise of the power of sale, etc., by and through Ernst, trustee,

The Coleman-Bush Investment Co. v. Figg, Trustee.

all remainders created by the deed of trust are cut off, and Mrs. Phillips' deed, joined in by Ernst, trustee, would convey to the purchaser of the 158 acres of land all the title Thomas J. Phillips had therein at the time he executed said deed. (McKay v. Mansfield, 14 B. M., 323; Moss v. Cross, 17 B. M., 741; Coats' Ex'or v. L. & N. R. Co., 18 Ky. Rep., 557; Lyons v. Marsh, 116 Mass., 332.)

And there seems no reason to doubt that the substituted trustee has the same power in this regard that the original trustee had, as the whole power of sale and conveyance rests in the will of Mrs. Phillips and is alone for her benefit. (1 Perry on Trusts, sec. 248; Gibbs v. Marsh, 2 Met. (Mass.), 251.)

2. The Louisville Chancery Court had power to appoint Figg as a substituted trustee. (1 Perry on Trusts, sec. 294; Coleman v. Caldwell, 7 B. M., 175; Harper v. Straus, 14 B. M., 57.)
3. Thomas J. Phillips at the time he conveyed the land to Ernst, trustee, had only a defeasible fee therein. (2 Jarman on Wills, 498; Bryant v. Bryant's Ex'ors, 6 Ky. Law Rep., 293; McKay v. Mansfield, 14 B. M., 323.)

Therefore the wife and her trustee could invest the purchaser from her with only a defeasible fee, which would ripen into a fee-simple absolute, provided Thomas J. Phillips should leave living issue at his death; and it would be divested and pass to the sisters or sister of Thomas J. Phillips, if alive; in case he should die not leaving issue surviving him. (May v. Hill, 5 Litt., 812; Nunally v. White, 3 Met., 588; Hughes v. Hughes, 12 B. M., 117; McKay v. Mayfield, 14 B. M., 323.)

4. The word "survivor" must have its natural and literal meaning, unless the intent of the testator imperatively requires it to have a more general meaning. (2 Jarman on Wills, p. 709; Tier v. Pennell, 1 Edw., 354; Jackson v. Thompson, 6 Cow., 178; Deboe v. Lowen, 8 B. M., 616; Harris, &c., v. Berry, &c., 7 Bush, 114; Best v. Conn, 10 Bush, 36.)

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

On the 8th of August, in the year 1842, the will of Thomas Phillips was admitted to probate in the Jefferson County Court. He owned a large landed estate and devised nine hundred and fifty acres of his realty, situated near the city of Louisville, to his grandchildren, who were the children of his son, David Phillips. The grandchildren were three in number, viz.: Thomas J. Phillips, Sallie Philips and Mary E. Phillips. His will has been hereto-

THE COLEMAN-BUSH INVESTMENT CO. v. FIZZ, TRUSTEE.

fore in this court for construction, but the question then raised did not involve the points now necessary to be considered.

Benoni Fizz, as trustee for Jane Phillips, Jane Phillips and her son, David Ewell Phillips, sold 158 acres of this land to The Coleman-Bush Investment Company. They are now resisting the specific execution of the contract, on the ground of a want of title in their vendors.

There was a partition of that land between the three grandchildren, by which each one received his or her share, and that part allotted to Thomas J. Phillips contained 360 acres, and the 158 acres sold the Investment Company is a part of that 360 acres.

In the year 1862, or prior to that time, this land allotted to Thomas J. Phillips, the whole of it, was sold under a decree of the Louisville Chancery Court for his debts, and purchased by Mrs. Ann Phillips, to whom a conveyance was made by the commissioner, she, in this way, acquiring all of Thomas J. Phillips' title. In the year 1865 Ann Phillips and her husband conveyed this land back to Thomas J. Phillips, and on the 11th of October, 1865, Thomas J. Phillips conveyed it to one Robert Ernst, in trust for the sole and separate use of his, the grantor's, wife, Jane A. Phillips, during her natural life, and after her death, to her children born of that marriage, and if none, then to go to Thomas J. Phillips. The conveyance further provided that his wife was to have the sole right to use and enjoy the premises, make leases, with the power given the trustee to sell and make a *good title to the purchaser by the written consent of Jane A. Phillips, and to dispose of the purchase money as she, the wife, may order in writing.*

The Coleman-Bush Investment Co. v. Figg, Trustee.

The trustee, Ernst, resigned, and Benoni Figg was appointed in his stead, accepted the trust and has been acting as such, but never gave bond.

Jane A. Phillips was divorced from her husband, and they had, prior to the divorce, one child, David Ewell Phillips, who united with his mother and her trustee, Figg, in the sale of this land to the Investment Company.

It follows that whatever title Thomas J. Phillips had originally to this land passed to his wife for life, coupled with the power of sale on the part of the trustee by and with the consent of the wife (Jane A. Phillips) in writing. This she has done by uniting with the trustee and her son in the conveyance, and while the original trustee, Ernst, made no conveyance to the present trustee, Figg, the parties are in a court of equity, and are asking the chancellor to allow them to do what the will expressly authorizes, and the only child, as well as the father, Thomas J. Phillips, are consenting, or have tendered deeds in this case necessarily confirming the action of the wife and her present trustee, and the power to the present trustee to sell under this provision of the will can be given as well after as at the time of the appointment, and this the chancellor has done by enforcing the contract. Whatever title Thomas J. Phillips acquired under the will of his grandfather, Thomas Phillips, passes to this appellee, and what that title was depends upon the construction given the sixth clause of the testator's will under which this devise was made.

In this devise it is provided: "Should either of said grandchildren die without leaving lawful issue then living, the right and interest in the property devised to such grandchildren is to become the right and property of the

The Coleman-Bush Investment Co. v. Figg, Trustee.

survivor or survivors of them, and should they all depart this life without lawful issue living at the time of their death, the property is then to vest in and become the right and property of my surviving children and the issue of such of them as now are or may then be dead, to be divided among them according to the laws of distribution of those dying intestate."

These grandchildren each took a defeasible fee, their estate subject to be defeated upon their death without leaving issue surviving, their interest in such event going to the survivor or survivors. All three of these devisees are married and have a child or children, still, if at their death there is no child or children surviving the one so dying, his or her interest will go to the survivor or survivors. Then in what manner is the defendant to obtain the title, and was it obtained by the proceeding in this case? We understand from the record that the devisees (the grandchildren) unite in the conveyance tendered this appellant, by which they relinquish all right and title to this land as survivors if the estate vested in either should be defeated by the happening of the contingency mentioned in the will. It is manifest that the three own the entire land and are the only persons to take as survivors, and if their right and title is conveyed as such, it makes the title perfect. It is urged, however, that the words "survivor or survivors" embrace the children of their grandchildren, and therefore if one of the direct devisees should die, say, Thomas J. Phillips, and at his death one of his sisters should be dead, leaving children, that the children of the deceased sister would take as the survivor. We think not. The surviving sister or the surviving devisee would take only and not the children of the grandchild of

The Coleman-Bush Investment Co. v. Figg, Trustee.

the testator, and therefore we find no contingent interests in this case, only in case of all three of the devisees dying without issue, and then (if the devise is valid) it would pass by the will to the children of the testator and their descendants, but the appellants are willing to accept the deed with such a contingency resting upon the title.

There is often trouble in determining what meaning to attach to the words "survivor or survivors," and we find conflicting opinions on this question. There is a seeming conflict between the case of *Best v. Conn*, reported in 10 Bush, 36, and that of *Harris v. Berry*, reported in 7 Bush, 113. It is at last a question of intention, and as said in *Harris v. Berry*, the word survivor is a flexible term, to be molded by the context and spirit of the will. Mr. Jarman says, volume 2, section 239, on this subject: "We are now taught by a series of decisions, which outweigh any opposing dicta or opinions, that the word 'survivor,' like every other term, when unexplained by other parts of the will, is to be interpreted according to its strict and literal meaning."

The main object in construing the words of a will is to carry out the intention of the deviser, and really this is the fixed rule to be applied to the construction of any such writing when presented, and a different meaning may be given to the same word or language used in different wills by reason of the context, and the circumstances connected with its execution, as gathered from the face of the instrument.

The evident purpose of the testator in this case was to create a defeasible fee in his grandchildren and nothing more. If he had designed that the children of one of his grandchildren should take an interest in the principal

Jackson v. Roberts, Admr., &c.

devise, on the happening of the contingency, he would have said so, because he realized, or the draughtsman of the will did, the necessity of using such language when intending his remote descendants to take. The will provides, by language used in this same provision, that if all of their grandchildren die without issue living at their death, then it is to vest in *my surviving children and the issue of such of them as now are or may then be dead*, thus providing in express terms for the children of his surviving children, manifesting clearly that the mind of the testator was upon that subject, and it is therefore reasonable to assume that in omitting to devise to the children of the grandchildren this contingent interest, in the event the parent was not living to take, he intended to confine the devise to the survivor or survivors of the three devisees. This we think is the rational construction of the instrument, and carries into effect the purpose of the testator.

Judgment affirmed. •

CASE 71—MOTION—MARCH 31.

Jackson v. Roberts, Admr., &c.

APPEAL FROM GRANT COURT OF COMMON PLEAS.

1. **PURCHASE OF LAND BY ADMINISTRATOR AT EXECUTION SALE.**—An administrator may, without joining the heirs, proceed by notice and motion for the recovery of land which he has purchased at a sale made under execution in his favor as administrator, as land thus purchased by an administrator may be treated as personalty until his duty touching it is performed, and that duty is to collect and hold its proceeds for distribution among the heirs or for the payment of debts. But while the heirs were not necessary parties to such a proceeding

Jackson v. Roberts, Admr., &c.

instituted by the administrator, the execution defendant can not complain that they were substituted as plaintiffs for the administrator.

2. **DEEDS—DESCRIPTION OF GRANTEE.**—The use of the word “administrator” after the name of the grantee in a sheriff’s deed must, if technical rules are to be applied, be considered as merely a description of the person.

COLLINS & FENLEY FOR APPELLANT.

1. The administrator can have no title or interest in the real estate of the decedent, and therefore had no right or power to maintain or even institute the action or special proceeding, whichever it may be called. (Gen. Stats., chap. 89, art. 2; 9 Dana, 281; Heeter, &c., v. Jewell, 6 Bush, 512.)
2. The administrator having no right to maintain the action, the heirs had no right to be substituted to the benefit of the notice or the motion made by him and thus become plaintiffs. (Gen. Stats., chap. 38, art. 12, sec. 9; Civil Code, sec. 134.)
3. While the judgment, the execution, the sale and the deed are copied into the record, there is no order introducing them as evidence, nor were they used as such, and unless it affirmatively appear that they were used on the trial this court will not consider them on the trial here; and in their absence there is no support for the judgment. (Lynn Boyd Tobacco Warehouse Co. v. Terrill, 12 Bush, 163.)

B. F. MENEFEE FOR APPELLEE.

1. The notice contained all the necessary allegations. (Gen. Stats., chap. 38, art. 12, sec. 9; McGhee v. Sutherland, 8 Ky. Law Rep., 87.)
2. The administrator having the right to maintain the action for the debt due his decedent had the right to purchase the land to satisfy his judgment and therefore to maintain this proceeding for its recovery. (Krieger v. Bissell, Trustee, 4 Ky. Law Rep., 11; Civil Code, sec. 21.)

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

M. L. Roberts was the administrator of W. L. Roberts, and as such obtained a judgment at law against the appellant, Jackson, in the Grant Common Pleas Court for the sum of \$85.00. He caused an execution thereon to be issued and levied on a house and lot belonging to Jackson, and at the sale thereof by the sheriff, on May 14, 1888, became the purchaser at the price of \$167.20, which paid the judgment, including interest and costs.

Jackson v. Roberts, Admr., &c.

This price was less than two-thirds of the appraised value of the property, but the defendant in the execution failing to redeem it, the sheriff, on May 16, 1892, executed and delivered a deed therefor to M. L. Roberts, administrator, who thereupon gave notice to the appellant that he would enter a motion in the Grant Common Pleas Court on September 5, 1892, for the possession of the property, as provided in chapter 38, article 12, section 9, of the General Statutes.

Jackson demurred specially to the notice and proceeding because Roberts had not capacity to sue or institute the proceedings, being only the administrator of the personal estate, and generally because the facts alleged in the notice were insufficient to entitle the plaintiff to recover, because no deed had been exhibited and no allegation made that the time for redemption had expired, and because the levy and sale had not been set forth in the notice. Of this general demurrer it is sufficient to say that the notice is in exact compliance with the statute named, and the court properly overruled the objection to it. The court, however, sustained the special demurrer as to Roberts' capacity to sue, and over the objection of the appellant and at the instance of the heirs of W. L. Roberts made them plaintiffs in the motion and proceedings for possession. Jackson then filed his response, in which he denied the right of M. L. Roberts, administrator, to maintain the action or proceeding, or that all the heirs of W. L. Roberts had been made plaintiffs, and asserted further that he had paid the debt for which the judgment had been rendered prior to its rendition, etc. The court sustained a demurrer to the response and entered a judgment for the plaintiffs for the possession

of the land. It is insisted that the judgment is erroneous because Roberts, administrator, could not maintain such a proceeding, or if he could, then the judgment should have given him the possession and not the heirs of W. L. Roberts, and moreover that the plaintiffs did not on the trial exhibit the judgment, the execution, its levy or the sheriff's deed. As to this last contention we need say only that the notice referred to the execution and the sale thereunder, and the respondent in express terms admitted the existence of the deed to Roberts, administrator, and that it embraced the land in controversy. These exhibits are in the record, and whether filed or used as part of the notice or as evidence we do not know. We assume they were used in the proceedings in some way, as there is no bill of exceptions filed by the appellant showing what was done, and the only thing we can consider is the sufficiency of the response. Certainly the administrator has no right or interest in the real estate of the decedent, but this property was no part of the real estate of the decedent. We think he had the right to purchase it as the plaintiff in the execution and representative of the estate. He could not make a profit by the purchase, but was the trustee or agent of the heirs or creditors of the estate. The note on Jackson came to his hands, and he was only doing his duty in attempting its collection. It makes no difference what form this asset took on, it was only a part of the estate in the hands of the administrator, and it may be treated as personalty until the duty of the administrator touching it was performed, and that duty was to collect and hold its proceeds for distribution among the heirs or for the payment of debts. It is said, however, that there were

Jackson v. Roberts, Admr., &c.

no debts and that the administrator had settled his accounts, but no order to that effect is produced, and certainly his functions concerning this debt and its ultimate collection and distribution can not be said to have terminated. Nor do we see in what respect it was error to allow the other heirs to be made parties. It was but the substitution of the real parties in interest, and of this the defendant in the execution can not complain. His debt was paid by the sale of his land, and it seems to us his objections are purely technical. But if technical rules are applied he is in no better attitude. M. L. Roberts, "*admr.*," was the purchaser, and to him the deed was made. He also gave the notice and made the motion. He is not said to be the administrator of W. L. Roberts, and the use of the term "*admr.*" after his name in the sheriff's deed to him may be and must in strictness be considered as merely a description of the person. His motion for possession was sustained, and it is a matter of no consequence to the defendant that he allowed others to share with him the benefit of his purchase.

Judgment affirmed.

Johnson v. Wilson.

CASE 72—AGREED CASE—APRIL 8.

Johnson v. Wilson.

APPEAL FROM FAYETTE CIRCUIT COURT.

96	415
97	887
97	532
96	415
98	393
99	96

ELECTION OF CITY OFFICERS UNDER NEW CONSTITUTION.—Under section 167 of the Constitution of 1891, the terms of all city and town officers expired in November, 1893, as that section was intended to provide for the election at that time, not only of city officers whose election was specifically provided for by the Constitution, or by general laws enacted in conformity to its provisions, but also for the election of officers provided for by such city charters as might in November, 1893, be still in force by reason of the failure of the Legislature to pass a general law for the government of such cities. Therefore the term of the treasurer of the City of Lexington, elected in March, 1892, expired in November, 1893, and his successor was then properly elected, although the city charter, which was continued in force by the Constitution (except so far as is inconsistent with its provisions), and which had not in November, 1893, been superseded by a general law for the government of cities of that class, fixed the term at two years.

J. R. MORTON FOR APPELLANT.

The election of appellee in November, 1893, was unauthorized, and therefore appellant is entitled to hold the office until the election and qualification of his successor as provided by law. (Secs. 160, 166, 167 of the Constitution of Kentucky; sec. 1 of the schedule to the Constitution.)

M. H. BUFORD FOR APPELLEE.

Cited: Secs. 148, 160 and 167 of the Constitution.

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

The controversy between the appellant and the appellee is shown by the following "agreed case," submitted by the parties to the lower court for adjudication, to-wit:

"That on the first Saturday of March, 1892, and at the regular city election that year, defendant, D. V. Johnson, was duly elected treasurer of the City of Lexington, and

Johnson v. Wilson.

duly qualified as such on April 14, 1892, and has since that time held said office and discharged the duties thereof. That, at the regular election held on the 7th day of November, 1893, plaintiff, B. B. Wilson, was elected treasurer of the City of Lexington, and has taken the oath required by law, and executed bond for the faithful performance of his duties as treasurer. That plaintiff has demanded of defendant the possession of the office of treasurer of the city, together with the money in the hands of the defendant, as treasurer, and defendant has refused to deliver the same, claiming that his term of office has not expired, and does not expire upon the election and qualification of the plaintiff, as by him claimed."

The judgment was for Wilson, and Johnson has appealed.

Section 167 of the Constitution of 1891 provides that "all city and town officers in this State shall be elected or appointed, as provided in the charter of each respective town and city, until the general election in November, 1893, and until their successors shall be elected and qualified, at which time the terms of all such officers shall expire; and at that election, and thereafter as their terms of office may expire, all officers required to be elected in cities and towns by this Constitution, or by general laws enacted in conformity to its provisions, shall be elected at the general elections in November, but only in the odd years, except members of municipal legislative boards, who may be elected either in even or odd years, or part in the even and part in the odd years," etc.

The treasurer of the city, under the old charter, was

elected for a term of two years and therefore, unless it be otherwise provided in the foregoing section, Johnson's term would not terminate until in April, 1894. We think that if effect be given the plain intent of this section, the term of the treasurer expired in November, 1893. It is true he was to hold until the general election in November, 1893, *and* until his successor was elected and qualified; but this is the usual method provided to prevent a vacancy, when from some unforeseen circumstance no election has been held at the regular time, or some time must elapse until the succeeding officer shall qualify and be inducted into the office. As said in *Stevens v. Wyatt*, 16 B. M., 542: "Such continuation was manifestly designed to obviate any inconveniences that might attend vacancies occurring between the expiration of the term of the incumbent and the qualification of his successor."

Therefore, although Johnson's term under the old charter would not expire until in April, 1894, yet in view of the foregoing section he took the office "until the general election in November, 1893," but he might hold over until his successor should be elected and qualified. But it is said that there is no provision in the law for the election in November of a treasurer for cities of the second class; that the section provides only that at that election officers required to be elected in cities and towns by the Constitution (and there is no such requirement as to the office of treasurer), or by general laws enacted in conformity to its provisions (and there were none for this city), shall be elected at the general elections in November.

In other words, that under section 160 the mayor or chief executive, police judges, members of legislative

boards or councils of towns and cities shall be elected by the qualified voters thereof, but nothing is said of the election of treasurers, and therefore this election in November is not provided for under the Constitution, and moreover, that their election was not provided for by any general law enacted in conformity to the Constitution, because of the failure of the General Assembly to do so until after the election of 1893. And these two classes of officers are the only ones to be elected at the November election, 1893—that is, first, those officers required to be elected under the Constitution, and second, those to be elected by virtue of some general law of the General Assembly, and into neither of these classes does the office in question fall, though intended to be regulated by a general law as yet not enacted. This construction is over strict. Its adoption would lead to the absurd conclusion that, after providing in plain language for the expiration of the term of all appointed and elected officers of cities and towns, yet the makers of the Constitution made no provision for the election of their successors and intended certain of these “hold overs” to continue in office indefinitely, and in contravention at least to the spirit of the Constitution.

If the term of the appellant did not expire in November, 1893, it would seem that he must hold his office until in 1897, or at any rate until ousted by legislative enactment. Under the provisions of section 166 of the Constitution, the law of the city, as embraced in its charter, was continued in force, save in so far as inconsistent with the Constitution, and therefore the election for treasurer provided for in the old instrument was properly held under the new in November, 1893, when that officer's term

expired, as it could not be held in March or April, 1894.

Moreover, it would seem, by reason of the continuation of the provisions of the charter, which required the election of the treasurer by the qualified voters, that his election was one required by the new instrument. The old law required his election, and this requirement was continued in the new by keeping the old law alive and in force, the time only of the election being changed and the expiration of the term. It was therefore an election under the new law of an officer required to be elected by the new law, because the new prolonged the old in this particular.

While some confusion has arisen by reason of the failure of the General Assembly to pass, prior to November, 1893, the general laws contemplated by the framers of the Constitution, thus giving rise to the somewhat plausible contention of the appellant, we are convinced that the construction adopted by the learned judge below is more nearly in accord with the intent and meaning of the new instrument.

Judgment affirmed.

Goldsmith v. Owen, Judge of Daveiss Circuit Court.

CASE 73—MOTION—MARCH 20.

95 420
107 425Goldsmith v. Owen, Judge of Daveiss Circuit
Court.

A WRIT OF PROHIBITION will not be granted where the inferior court sought to be restrained has jurisdiction, although the complainant may fail to state facts sufficient to constitute a cause of action or the testimony may fail to sustain the cause of action alleged.

C. S. WALKER FOR PLAINTIFFS, IN PETITION FOR REHEARING.

(Brief not in record.)

The salient point in the application is the fact that in this particular case the Daveiss Circuit Court had no jurisdiction to set aside the assignment as fraudulent or to appoint a receiver, because the petition shows that the plaintiffs in the action where the assignment was canceled and the receiver was appointed were simple creditors and had no judgment and return of "no property found," and no attachment was sued out.

POWERS & ATCHISON FOR DEFENDANTS.

1. The Court of Appeals has no jurisdiction to issue a writ of prohibition (Civil Code, sec. 734; Const. of Kentucky, sec. 110; Civil Code, secs. 477, 479; *Sasseen v. Hammond*, 18 B. M., 672.)
2. Even if the Court of Appeals has such jurisdiction the facts stated in the petition for the writ in this case were not sufficient to authorize the court to exercise the jurisdiction. A writ of prohibition is never to be issued unless it clearly appears that the inferior court is about to exceed its jurisdiction. (*Black Lick Turnpike Co. v. Phelps*, County Judge, 81 Ky., 613; *Ex parte Gordon*, 1 Black, 503; *Ex parte Pennsylvania*, 109 U. S., 174; *Smith v. Whitney*, 116 U. S., 197; *Ex parte Gordon*, 104 U. S., 515; *Ex parte Detroit River Ferry Co.*, 104 U. S., 519.)

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

There is a plain distinction between cases where a court is without jurisdiction and cases where the jurisdiction exists and the proceedings are erroneous or irregular. In this case the Daveiss Equity Court had undoubted jurisdiction to cancel a fraudulent assignment and also to

Broadus v. Mason.

appoint a receiver, and because the facts alleged fail to state a cause of action, or if a cause of action is stated, the testimony fails to support it, affords no ground for granting the writ of prohibition; if so, the writ would go in every case where the pleading upon which the recovery sought is based is bad on demurrer, or where the court has rendered an erroneous judgment. Whether the court erred is a question we have not considered.

The application for the writ is denied.

CASE 74—CONTEST OF ELECTION—APRIL 8.

Broadus v. Mason.

APPEAL FROM GARRARD CIRCUIT COURT.

95	421
96	608
95	421
100	338
100	338
95	421
109	646
95	421
112	33
112	49
112	64

1. **SERVICE OF NOTICE OF ELECTION CONTEST.**—In the absence of any provision in the election law prescribing the mode of serving notice of contest of election, it is to be presumed the Legislature intended it done according to section 625 of the Civil Code, which provides that if a person to whom a notice is directed can not be found at his usual place of abode, it may be served by leaving a copy "there" with a person over the age of sixteen years, residing in the same family with him. And under this statute it is not material whether the person who received the notice was at the time in touch of the place of abode of the person to whom the notice was directed, or two hundred yards away, if he was in other respects a proper person to leave the paper with, and undertook to deliver it to the person to whom it was directed, or put it within the abode where he could get it on his return. Moreover, as the person to whom the notice was directed in this case had left the county to avoid service of notice, he is not in a position to question the sufficiency of service, especially as he had, and availed himself of, full opportunity to make defense to the proceeding.
2. **A CONTESTING ELECTION BOARD HAS POWER TO GO BEHIND RETURNS OF OFFICERS** of election at each precinct, and adjudicate and determine who was legally elected and entitled to an office, and where the ballots have been destroyed, parol evidence is admissible for the purpose of determining who was in fact elected.

Broadus v. Mason.

In this case the ballots were correctly counted, and number of votes to which each candidate was entitled was ascertained, but officers of the election simply made a mistake in casting up or adding the votes together after the ballots were counted, the mistake being shown by a tally paper explained and corroborated by testimony of officers of election. *Held*—That the contesting board had power to correct the mistake.

3. THE CANVASSING BOARD was not intended to perform any other than ministerial duties.

WM. HERNDON FOR APPELLANT.

1. There was not a sufficient service of the notice of contest. (Civil Code, sec. 625; Election Law, art. 8, sec. 5; *Fleece v. Goodrum*, 1 Duv., 806.)
2. The appellant did not enter his appearance and neither did, nor could do, any act to give the contesting board jurisdiction. (*Batman v. Megman*, 1 Met., 537.)
3. After the polls at a voting place have been closed, the ballots counted, the result certified and announced, and the ballots destroyed, there can not be a recount or any action by a contesting board to change that decisive result. (6 Am. and Eng. Ency. of Law, 885-6; *Idem*, 425; *State v. Bate*, 36 N. W. Rep., 17; *Clark v. McKenzie*, 7 Bush, 527.)

W. G. WELCH FOR APPELLEE.

1. A mistake in the returns of election officers may be corrected where proof of the mistake is clear and satisfactory. (Election Law of Ky., art. 8, secs. 4, 6 and 9; *Leeman v. Hinton*, 1 Duv., 40; *McCrary on Elections*, secs. 201, 202, 203, 197, 896, 468, 469, 473.)
2. Appellant waived notice by entering his appearance and making defense. (Election Law of Ky., art. 8, sec. 5; *McCrary on Elections*, sec. 395; *Marshall v. Bynam*, 1 Bibb, 341; *Smith v. Robinson*, 1 Mon., 15.)
3. Appellant was not only served with notice, as provided by law, but was doubly served.

The Code provision that in such case notice should be left at the house is only directory. (*Sedgwick on Construction of Statutes*, p. 322.)

In any event, appellant's contention that he was not served is entitled to small consideration in view of the fact that he fled the county to avoid service. (*Willis v. Vallette*, 4 Mon., 190.)

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

The question in this case is whether appellant, W. E. Broadus, or appellee, W. B. Mason, is entitled to office of Circuit Court Clerk of Garrard County, for which they

Broaddus v. Mason.

were opposing candidates at the general election held November 8, 1892.

The only complaint made by either party is of an alleged mistake in the return of officers of election at precinct No. 4, showing 146 votes for Broaddus and 136 for Mason. But the canvassing board accepting that return as true, examining it in connection with others, found Broaddus had received highest number of all votes for that office in the county, and accordingly gave him a certificate of election.

The contesting board, however, found upon evidence heard that Broaddus actually received at precinct No. 4 only 128 and Mason only 127 votes, which being added to votes received by them respectively at other precincts, made a majority of 4 in favor of the latter, who was then adjudged entitled to the office in question. And upon appeal to the Garrard Circuit Court the same fact was found and same judgment rendered.

Officers of election at precinct 4 concur in their testimony a mistake was made in their return, and show, from the tally paper kept while the votes were counted and cast up, plainly how it occurred.

It appears that at close of voting on that day the ballots were all taken from the box and, for purpose of counting, placed in three separate lots on floor of the room where the election had been held. In one lot were put all ballots showing the straight Democratic ticket had been voted; in another, all ballots showing straight Republican ticket had been voted, and in the third, all ballots showing one or other ticket had been scratched, that is, one or more candidates had been omitted by the several voters.

Broaddus v. Mason.

Upon counting the first two mentioned lots of ballots, it was ascertained that each candidate whose name was on the Democratic ticket, including Mason, had received 124 votes, and it was so put on the tally paper; and each one whose name was on the Republican ticket, including Broaddus, had received 127 votes, and it was likewise so indicated on the tally paper.

Upon counting the third lot of ballots, it was found that candidates for office of presidential elector on the Democratic ticket, whose names were put at head of the ballots, had received 9 votes, which were added to 124 already counted, making 133 aggregate number of votes received by them at that precinct, while candidates for the same office on the Republican ticket had received 18 votes, which were added to 127 already counted, making 145 aggregate number of votes received by them. But of the whole number of that class of ballots, Mason received only 3 votes, which, added to 124 already counted for him, as should have been done, makes the actual number he received at that precinct 127, while Broaddus received only 1 vote, which, added to 127 already counted for him, as should have been done, makes the actual number he received there 128 votes.

But the officers of election, though correctly counting ballots given to each candidate, erroneously added 3 votes, found among the scratched ballots for Mason, to 133 aggregate of votes given to candidates on Democratic ticket for the office of elector, instead of adding to 124, actual and whole number already counted for him. And in the same way they added 1 vote, found among scratched ballots for Broaddus, to 145 aggregate of votes given to candidates on the Republican ticket for office of elector,

instead of adding to 127, actual and whole number already counted for him.

It thus appearing a mistake was made in the return of said officers of election, correction of which gives Mason title to the office, we will now consider whether there were such errors of law, by either contesting board or circuit court, as authorize a reversal.

1. Was proper notice of contest given in due time? The statute regulating elections requires the notice to be in writing, signed by contestant, stating his grounds of contest, and for an office like the one in question, given within ten days after final action of the board of canvassers, which, manifestly, is the act of issuing certificate of election to that candidate having, according to the returns, highest number of votes for a given office. But it does not prescribe the mode of serving such notice, and consequently the Legislature must have intended it done according to section 625 Civil Code, which provides that if a person to whom a notice is directed can not be found at his usual place of abode, it may be served by leaving a copy *there* with a person over the age of sixteen years, residing in the same family with him.

Return of the sheriff shows appellant could not be found at his usual place of abode, and that there was a literal compliance, in due time, with the provision of the Code in such case. But both the contesting board and circuit court overruled a motion to permit correction of the return so as to conform to facts proved, and their action is now made ground for reversal. We think, however, the law was substantially complied with, even if the notice was served in the manner shown by evidence of witnesses. It appears the officer did, in fact, leave a

Broaddus v. Mason.

copy of the notice with a person over sixteen years of age, residing in the same family with appellant, who was absent from the county continuously from the second day after receiving his certificate of election until after expiration of the period within which the notice could be served. And though the person who received the notice was at the time from fifty to two hundred yards distant from appellant's place of abode, testimony on the subject varying, it should be regarded as having been, in meaning of the Civil Code, left *there* with a proper person. For it is not material whether the person was, at the time, within touch of the place or two hundred yards away, if he was in other respects a proper person to leave the paper with and undertook to either deliver it or put it within the abode where appellant could get it on his return. It appears he did, in compliance with his promise to the sheriff, immediately put the copy at a place in the dwelling-house where it was reasonably certain appellant would get it, and where he did find it when he returned. Moreover, appellant knew appellee would contest his right to the office, and the evidence tends to show he left the county to avoid service of the notice; consequently, he is not in a position to call in question sufficiency of service of notice, especially as he had, and availed himself of, full opportunity to make defense to the proceeding.

2. The proposition of appellant's counsel, on question of jurisdiction, seems to be that after ballots have been counted and destroyed, as the statute requires, and certified return by officers of election made and duly filed with the canvassing board, there can be no recount or other action taken by the contesting board, whereby to

change the declared result. Clearly, the canvassing board was not intended to perform any other than ministerial duties, for the statute restricts its power to examining or canvassing returns of an election, and giving a certificate of election to each candidate who has received *prima facie* highest number of votes for an office exclusively within gift of voters of a county, or giving certificate of number of votes received in the county by each candidate for an office not within exclusive gift of such county. So if that proposition be true, return of officers of election would have to be treated as conclusive in every case, and there could be no judicial inquiry as to their conduct, although the law may have been violated, and will of the people defeated by mistake or fraud on their part.

The statute, in express terms, provides for a board, composed of judge of the county and two justices of the peace, for determining the contested election of any officer elected by the voters of the county, or of any justice's district therein, etc., and gives it jurisdiction, "when another than the person returned shall be found to have received the highest number of legal votes given," to adjudge such other person to be elected and entitled to the office. And with that end in view, the contesting board is empowered to send for persons, papers and records, to issue attachments therefor, signed by its chairman, swear witnesses, and issue commissions for taking proof.

It seems to us, if the contesting board, created for such purposes, invested with such powers, has no power to go behind returns of officers of election at each precinct, and adjudicate and determine who was legally elected and entitled to an office like the one in question, it is impossible to see what was the purpose of creating it.

Broadus v. Mason.

It may be difficult, on account of ballots being destroyed, in many cases to determine whether officers of election have miscounted them and thereby made a false return, yet it is well settled that in order to ascertain the fact not who was returned elected, but who was in fact elected, parol evidence is admissible. (McCrary on Elections, section 468.) But we need not consider what would be sufficient evidence in such case to authorize a judicial tribunal to set aside a return of officers of election, for this is not a case involving question of miscount of the ballots by officers of election, there being no controversy on that subject. The ballots were, so far as this record shows, correctly counted, and number of votes to which each candidate was entitled ascertained, but officers of the election simply made a mistake in casting up or adding the votes together after being counted; and to establish that fact recounting the ballots is not necessary, the fact being satisfactorily proved, indeed demonstrated, by the tally paper, explained and corroborated by testimony of officers of election.

Judgment affirmed.

CASE 75—PETITION EQUITY—APRIL 5.

Aultman-Taylor Company v. Frasure, &c.

APPEAL FROM FLOYD CIRCUIT COURT.

1. WHERE A MARRIED WOMAN DID NOT VOLUNTARILY ACKNOWLEDGE A MORTGAGE executed by her on her land, and was not examined separately and apart from her husband, in an action to enforce the mortgage, she had the right, upon an allegation that the clerk had made a mistake in his certificate, to show the truth by parol evidence, the mortgagee having knowledge of the facts, having been present by agent at the time of the acknowledgment.
2. THE WIFE'S EXECUTION OF THE MORTGAGE HAVING BEEN PROCURED BY FRAUD OF THE HUSBAND, in which the agent of the mortgagee participated, and also by coercion, the mortgage is void as to her whether the acknowledgment was regular or not.

F. A. HOPKINS FOR APPELLANTS.

1. The bare preponderance of evidence is not sufficient to overturn the presumption that the officer did his duty, especially when the officer himself testifies that he took the acknowledgment of the wife separately and apart from her husband, and that she did freely and voluntarily acknowledge it. (*Hughes & Co. v. Coleman, &c.*, 10 Bush, 248.)
2. Mrs. Frasure having induced appellant Butcher to buy the land without intimating that she claimed it is estopped to deny his title. (*Ratliffe v. Bellfonte Iron Works*, 10 Ky. Law Rep., 646; *Springle v. Morris*, 3 Litt., 55; *Harrison, &c., v. Edwards, Idem*, 350; *Garault v. Anderson*, 2 Bibb, 543; *Barclay v. Hendricks, &c.*, 3 Dana, 645; *Sale v. Crutchfield*, 8 Bush, 645.)

JAMES GOBLE FOR APPELLEE CYNTHIA FRASURE.

1. The court will not reverse on facts unless the finding is palpably against the evidence. (*Commonwealth v. Williams*, 14 Bush, 297; *Williams v. Rogers, Idem*, 776; *Helm v. Coffey*, 80 Ky., 176.)
2. If the husband was present when the mortgage was acknowledged by the wife, as a preponderance of the evidence shows, the mortgage is void as to her. (*Mooreman v. Board*, 11 Bush, 140; *Gen. Stats.*, chap. 24, sec. 21.)
3. As the pleadings make the proper charges of fraud, the whole truth may be proved. (*Gen. Stats.*, chap. 81, sec. 17.)
4. The certificate on this mortgage does not conform to the law, and it is only in cases where the certificate is regular and in due form that it

95	429
118	660
95	429
125	324

Aultman-Taylor Company v. Frasure, &c.

has any conclusive effect upon the parties. (*Pribble v. Hall*, 18 Bush, 61.)

5. It must appear from an inspection of the mortgage that Mrs. Frasure intended to encumber her right or title to the land. Here she merely "waives the homestead exemptions" and "relinquishes dower." This is not sufficient. (*Hedger v. Ward*, 15 B. M., 116; *Still v. Swan*, Litt. Sel. Cases, 156; *Tevis v. Richardson*, 7 Mon., 661; *Hatcher v. Andrews*, 5 Bush, 564.)

T. Y. FITZPATRICK FOR APPELLEES.

1. The mortgage is void as to Mrs. Frasure because the certificate is made by the deputy clerk in his own name without using the name of the principal. (3 Kent's Comm., 11th ed., p. 458; *Talbott v. Hooser*, 12 Bush, 414; *McCormick v. Woods*, 14 Bush, 78; *Dry v. Cook, &c.*, 14 Bush, 459; *Harpending's Ex'ors v. Wylie*, 14 Bush, 386.)
2. It is only where the clerk's certificate is in proper and legal form that it is conclusive as to the facts stated in it. (*Cox v. Gill*, 88 Ky., 669.)
3. To constitute a valid acknowledgment by a feme covert under our statute it is indispensable that she should be privily examined, and upon such examination declare she freely and willingly executed the deed. (*Blackburn's Heirs v. Pennington*, 8 B. M., 217; *Gill, &c., v. Fauntleroy's Heirs*, 8 B. M., 178; *Mooreman v. Board*, 11 Bush, 140; *Harpending's Ex'ors v. Wylie, &c.*, 14 Bush, 386; Gen. Stats., chap. 24, sec. 38.)
4. We must look to the certificate of acknowledgment to see what interest the feme conveys if the certificate expresses what interest she conveys. (*Sutton v. Pollard*, 13 Ky. Law Rep., 85; *Breeding, &c., v. Tobin*, 13 Ky. Law Rep., 842.)

But if the certificate is silent, as it is here, we must look to the body of the instrument, and when we look we must find, in order to convey her right of inheritance, that she has expressly undertaken to do so, using apt words of grant. Here she merely joins in the mortgage and nothing more.

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

The Aultman-Taylor Company brought this action against William T. and Cynthia Frasure to recover on notes given to it by him for purchase price of a steam saw-mill, and also to subject a tract of land on which they, March 1, 1884, executed a mortgage to secure the debt. Judgment was rendered against him on the notes,

and by sale of the mill one of them was paid. But she, her husband refusing to join, filed a separate answer, alleging the mortgage was void because she signed and acknowledged it in presence of her husband and under coercion against her will. She further states that the land was not, as recited in the mortgage, his property, but belonged to her, and plaintiff, her husband, and one Butcher had combined to defraud her out of it.

It appears that she acquired by gift of her mother, and had allotted to her a certain tract of land which was subsequently sold for about \$1,250, and in 1877 she purchased of William Crisp the land in controversy at the price of \$2,000, of which she, with proceeds of the other tract and of personal property likewise derived from her mother, paid the sum of \$1,600; but not being able to pay the residue, a part of the land, amounting in value to \$400, was taken back by Crisp, and consequently no demand for balance of the \$2,000 could legally, or was ever after, made by Crisp or his heirs or representatives. But she, with her husband, has, ever since the purchase, continued in actual possession of the land so paid for.

After death of Crisp, his vendor, Davidson, brought an action for about \$589 unpaid purchase-money, and under judgment his lien was enforced and the entire tract sold July 9, 1883, for that sum, William T. Frasure becoming the purchaser. But he immediately instituted an action in his own name against him and representatives of Crisp and obtained a judgment for sale of real property belonging to his estate to repay what had been bid by him at sale of the land in controversy to satisfy debt of Davidson, and was thereby reimbursed except to the extent of about \$104.25.

Aultman-Taylor Company v. Frasure, &c.

July 29, 1885, which was subsequent to sale of Crisp land, William T. Frasure transferred his bid, and authorized commissioner's deed made to James Butcher for the entire tract, which was done. The consideration for that transfer, as recited in the contract between them, was payment already made by Butcher to Davidson of said \$104.25 and to The Aultman-Taylor Company \$356.75 of the mill notes and agreement to pay balance thereof, the entire consideration being \$2,000.

Cynthia Frasure states in her answer, and we think truly, that the purchase by her husband, under judgment in the action of Davidson v. Crisp's heirs and representatives, to which she was not a party, subsequent institution of the action in his name and for his benefit against same defendants, and transfer, likewise for his own benefit, to Butcher, were all done without her knowledge or consent.

No written evidence of her purchase of the land exists except an unsigned bond prepared by Crisp in February, 1877, and placed in hands of an attorney-at-law, where it remained until this action was commenced. Although not actually signed, the paper seems to show her right to the land was then understood and recognized by both Crisp and her husband, for it contains a covenant to convey it to her. But independent of that evidence it is made clear she purchased and paid for that part of the tract now claimed by her, with the agreement by her husband it was to be her property, and has been in adverse possession long enough to make her title good against Crisp's heirs. And we think it should also prevail against the deed made by commissioner of court to Butcher, if the mortgage be as to her void upon either

Aultman-Taylor Company v. Frasure, &c.

ground alleged in her answer; for, although he denies any knowledge of her title at time of his purchase from her husband, we are satisfied, from all circumstances of this case, he had sufficient notice to put him on inquiry.

As the mortgage was executed before Butcher purchased from William T. Frasure, he, of course, did not aid in procuring execution of it. But the evidence shows satisfactorily that her husband attempted to cheat her out of the land, and procurement of the mortgage and his sale to Butcher were parts of his plan to do so.

That she executed the mortgage under coercion of her husband, aided by two of her sons, and against her will, is made plain by the testimony. And we think it equally plain the agent of the Aultman-Taylor Company, who was present at the time, knew she did not freely sign and acknowledge it, and also knew she claimed the land as her own. For he was not only informed by Frasure, before arriving at her residence, she had not consented to execute it, but went there for the avowed purpose of seeing if she could not be induced to do so, as upon that depended sale and delivery of the mill, price of which had already been agreed on by him and Frasure. After his arrival she said, in his presence and that of her husband, the deputy clerk need not be sent for as she would not sign the mortgage; the land was hers, and she did not intend to give it away. Nevertheless the deputy clerk was sent for, and not only did her husband threaten to leave and never again "strike a lick upon the farm" unless she signed and acknowledged the mortgage, but two of their sons made a similar threat. It further appears the agent of the company told her it was to her interest to sign it, and there is evidence the deputy clerk

even persuaded her to do so. Being thus constrained and environed, finally, in language of a witness present, "she said she reckoned she would have to sign it, but it was awfully against her will." And the same witness and others testified "she was crying when she signed it, and kept on crying."

The mortgage which had been previously written, and is unusually long, verbose and tedious in detail, purports to convey, not her fee-simple title, although the agent was present and knew she claimed the land as her property, but merely her right of dower and homestead exemption, the evident intention being to thus ignore her right to the land and estop her setting up claim to it. The evidence also shows that her husband, though getting from his seat, did not leave the room, but was present when the deputy clerk took her acknowledgment, if he did do so legally.

The evidence thus conclusively showing that essential conditions of validity of the mortgage, as it affects Mrs. Frasure, were violated, the question arises to what extent, if at all, it can be used to contradict the clerk's certificate.

Section 17, chapter 81, General Statutes, provides: "Unless in a direct proceeding against himself or his sureties, no fact officially stated by an officer in respect of a matter about which he is by law required to make a statement in writing, either in the form of a certificate, return or otherwise, shall be called in question except upon the allegation of fraud on the part of the party benefited thereby, or mistake on the part of the officer." And in *Pribble v. Hall*, 13 Bush, 61, it was held that "the fraud which will, under the statute, let in an inquiry into the truth of the officer's certificate, must relate to the obtain-

ing of the certificate itself, not to the making of the instrument acknowledged." But whether there was fraud in that sense on the part of the party benefited in this case we need not inquire, because there was no allegation of the fact. It is, however, alleged the clerk committed a mistake in his certificate. And the evidence satisfactorily shows it not to be true, as he certifies, either that Mrs. Frasure was examined separately and apart from her husband or that she voluntarily acknowledged the mortgage.

There may be reason for the rule, as settled by this court, that "when a certificate is regular on its face and has been recorded, it should not be open to assault by parol evidence" so as to affect innocent purchasers (*Harpending's Ex'ors v. Wylie, &c.*, 14 Bush, 380). But where, as in this case, the mortgagee, by its agent, was present when the acknowledgment was taken and knew the clerk made a mistake about essential facts he was required to certify, we do not see why the truth may not be shown by parol evidence. For, if a certificate can not be called in question by reason of mistake on part of the clerk, committed in presence of a vendee or mortgagee, there is no state of case in which it can be done, and the exceptions contained do not apply or operate at all.

But whether the certificate of acknowledgment in question be valid and regular or not, the mortgage having, as the evidence shows, been obtained by fraud of the husband, in which the agent of the company participated, also by coercion, is void as to Mrs. Frasure; for, as said in *Pribble v. Hall*, if there was fraud in obtaining the deed, no sort of acknowledgment could purge it away,

Graded School District No. 2 v. Trustees of Bracken Academy.

and it would be equally invalid if execution of it was procured by coercion.

By the judgment appealed from, appellant, James Butcher, though the mortgage was set aside, was given a lien on the land for \$104.23, amount paid in satisfaction of the Davidson debt. This, we think, was proper, inasmuch as the land was bound for that debt. But the lower court left open the question of enforcing a lien on the land for \$356.75, paid by Butcher to The Aultman-Taylor Company on the mill debt, and it is consequently not before this court for decision.

Judgment affirmed.

CASE 76—PETITION EQUITY—APRIL 10.

Graded School District No. 2 v. Trustees of Bracken Academy.

APPEAL FROM BRACKEN CIRCUIT COURT.

1. **DONATION OF LANDS TO COUNTIES TO ESTABLISH SEMINARIES OF LEARNING—VESTED RIGHT.**—Where, under the act of 1798, donating lands to the different counties of the State for the purpose of establishing seminaries of learning, the trustees in whom was vested the title and control of the lands donated to a particular county have, under legislative authority, sold the lands and with the proceeds erected buildings and established a school in accordance with the provisions of the act, the Legislature has no power to take from these trustees or their successors the title to the property and vest it in the trustees of the common school district. And this is true, although the original act making the donation provided that it should "be subject to any future order of the Legislature," it being also provided that "the donation herein made shall forever continue appropriated to the use of seminaries." And even if the Legislature had the power to apply the property to common school uses, it would have no right to give it to

Graded School District No. 2 v. Trustees of Bracken Academy.

one of the school districts of the county to the exclusion of the other districts.

2. **SAME—POWER OF COURT TO REMOVE TRUSTEES.**—While the grant is irrevocable, the power exists on the part of the judiciary, when called upon, to see that the trustees of this fund, or of the buildings and grounds, use them as a seminary for educational purposes, and to remove them and appoint others upon their failure in good faith to carry out the purposes of the donation.

WM. H. HOLT, J. B. CLARKE AND GEORGE DONIPHAN FOR APPELLANTS.

1. The Legislature had the power to pass the act of February 27, 1890, by which the so-called Bracken Academy and its trustees were abolished and the control of the property turned over to the appellants, the Trustees of Common School District No. 2. The act creating and endowing the academy reserved the power to change or abolish it; and, besides, it was a public and not a private corporation, and no private right entered into it. (2 Littel's Laws, 242; Acts 1889-90, vol. 1, p. 22; City of Louisville v. President, &c., University, 15 B. M., 692-740; Angell & Ames on Corporations, p. 9; 5 Stew. & Port. (Ala.), 17.)
2. Conceding, for the sake of argument, the property was a part of the common school fund of the State (which it was not), yet, as the act placed the trustees of a common school district in charge of it for common school purposes, the act was in aid of the general system of common schools, and therefore within the power of the Legislature (Higgins v. Prater, 91 Ky., 6; Halbert v. Sparks, 9 Bush, 260.)

W. H. WADSWORTH FOR APPELLEES.

The act of February 27, 1890, is unconstitutional, because—

1. The subject of the act is not expressed in the title. (Session Acts 1889-90, vol. 3, p. 1466; Rushing v. Sebree and wife, 12 Bush, 200; Pennington v. Woolfolk, &c., 79 Ky., 13; Wulftange v. McCollom, &c., 83 Ky., 361.)
2. The act is in conflict with section 1, article 11 of the Constitution of 1850, which provides that the common school fund shall be held inviolate for the purpose of sustaining a system of common schools. (Auditor v. Holland, 14 Bush, 152; Halbert v. Sparks, 9 Bush, 263; Higgins v. Prater, 91 Ky., 6.)
3. The State has no power to revoke a grant, even of its own funds, when given to a corporation for special uses. And the State may aid a public corporation by *irrevocable* gift, as well as a private corporation. But even if the Legislature has the power to revoke a gift to a public corporation, the mere fact that the funds of a corporation were derived from the State does not determine that the corporation is public (Trustees Dartmouth College, &c., v. Woodward, 4 Wheat., 490; Cit.

Graded School Distric t No. 2 v. Trustees of Bracken Academy.

of *Louisville v. President, &c., University*, 15 B. M., 671; *Trustees of Vincennes University v. State of Indiana*, 14 How., 271; *Terrett v. Taylor*, 9 Cranch, 43.)

4. The act discriminates against the colored children of the district. (*Dawson v. Lee, &c.*, 88 Ky., 56.)

COCHRAN & SON ON SAME SIDE.

1. The act of February 27, 1890, is in violation of section 10, article 1 of the Constitution of the United States, which forbids the States passing any law impairing the obligation of contracts. The charters of corporations are contracts, within the prohibition of this section, unless they are charters of corporations created for governmental purposes and granted as part of the machinery of government. (*Hare on Constitutional Law*, vol. 1, p. 598; *Dartmouth College Case*, 4 Wheaton, 490; *Trustees of Vincennes University v. State of Indiana*, 14 How., 271.)
2. The act in question is in violation of article 11 of the Kentucky Constitution of 1850, forbidding a diversion of the common school fund. (*Halbert v. Sparks*, 9 Bush, 259; *Collins v. Henderson, &c.*, 11 Bush, 74; *The Auditor v. Holland*, 14 Bush, 147; *Higgins v. Prater*, 91 Ky., 6.)
3. The act is in violation of the fourteenth amendment to the Constitution of the United States, because it ignores the black citizens of the district, and gives them no right to share in the benefits of the fund. (*Claybrook v. City of Owensboro*, 16 Fed. Rep., 297; *Strander v. West Virginia*, 100 U. S., 308; *Ward v. Flood*, 48 Cal., 51; *Dawson v. Lee*, 88 Ky., 49.)

J. R. MINOR OF COUNSEL ON SAME SIDE.**JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.**

In the year 1798 the Legislature of this State, with a view of affording greater facilities for education and to establish seminaries of learning in each county throughout the entire Commonwealth, donated to each county six thousand acres of its vacant and unappropriated lands, located south of Green River, for that purpose.

The original act of December 19, 1798, specified many of the counties to which the donation was made, and designated the trustees in whom was vested the title and control of the fund or subject donated, subject to legisla-

Graded School District No. 2 v. Trustees of Bracken Academy.

tive control; and by the third section of the act the several counties not named, or in which seminaries had not been established, were entitled to the benefit of the law by establishing schools, the trustees to be subject to such regulations and rules as applied to the trustees who had been appointed by the Legislature.

Bracken was one of the counties to which the donation was expressly made, and Philip Buckner, Nathaniel Patterson, Samuel Brooks and others were constituted a body-politic and incorporate, and styled by the name of the trustees of the Bracken Academy. This was under the act of 1798, and these trustees and their successors have continued to hold the possession and title as a corporate body of the thing donated, or its proceeds, as well as the control of the seminary property, until the 5th of September, 1888, when, as trustees, they leased the seminary to P. B. Powell and others, who were the trustees of Graded Free School District No. 2, in the town of Augusta, for one year, and by an indorsement on the written lease the time was extended one year longer and ended the 1st of September, 1890. After the lease had expired the trustees of the Bracken Academy, the original lessors, demanded possession of their seminary and its grounds, and the appellants refused to deliver possession, denying the title of their landlord and claiming that the Legislature of Kentucky, by an act passed on the 24th day of May, 1890, had deprived them of their corporate existence and vested the right and title to the academy and its grounds in the trustees of Common School District No. 2, in Bracken County.

The appellees, trustees of Bracken Academy, sued out this writ of forcible detainer against their lessees, and

Graded School District No. 2 v. Trustees of Bracken Academy.

during the progress of the case the trustees of the Common School District No. 2 were made parties-defendants on their motion, and were, in fact, in the possession when the writ issued, claiming the property by reason of the act of May 24, 1890.

It is desired by all the parties to this appeal that the case should be decided on its merits, and we will not therefore take notice of the refusal of the lessees to regard the title of their lessors, or the surrender of the possession by them to the trustees of Common School District No. 2, with the knowledge on the part of the latter as to the manner in which the lessees of appellees entered. The question then arises, did the act of May 24, 1890, deprive these appellees, who were the legitimate successors of the original trustees of Bracken Academy, of their right and title to the seminary and its grounds.

By the provisions of the second section of the act of 1798 there was donated to the original trustees and their successors six thousand acres of these vacant lands for the benefit of the academy, and it was then stipulated that the land should not be leased by these trustees for a longer period than twenty years; and further stipulated that the lands should revert to the State if the trustees did not, within ten years, establish a school with at least twelve scholars.

It was also provided "*that the several grants and appropriations of land shall be subject to any future order of the Legislature; but no act shall be passed to impair any contract which may be made by the trustees of any of the seminaries established by this act by virtue of the powers herein delegated to them. And provided always, that the donation herein made shall forever continue*

Graded School District No. 2 v. Trustees of Bracken Academy.

appropriated to the use of seminaries." (2 Littell's Laws of Ky., 240-246.)

Under this section, providing that the "several grants and appropriations of lands shall be subject to any future order of the Legislature," it is claimed the Legislature derived its power to take this land from Bracken Academy or its trustees, and vest the title in the trustees of Common School District No. 2.

In the month of December, 1804, the Legislature, exercising its power and control over these lands, authorized the trustees to sell one-half of the land to erect buildings, etc.; and in the year 1815 empowered the trustees to sell all the land donated to them, and in December, 1822, Augusta College having been incorporated, the trustees of Bracken Academy appropriated \$10,000 of the funds in their hands to this seminary, with the approval of the Legislature (Session Acts 1822, page 163), and in 1834 the trustees of Bracken Academy were authorized to transfer to the trustees of Augusta College \$10,000 in their hands, to be managed by the trustees of that college, and in case the college was not kept up, the money to be refunded to the trustees of Bracken Academy. It is said, and a fact not disputed, that the college no longer exists, except as the Bracken Academy, the trustees of the academy having full possession of the grounds and buildings at the time the lease to the graded school was made. This exercise of power by the Legislature is alluded to for the purpose of construing that portion of the act in which the Legislature reserved the right to *make orders as to the grants* of the lands donated.

There was only one condition upon which the land was to revert to the State, and that was upon the failure of

Graded School District No. 2 v. Trustees of Bracken Academy.

the trustees to have a school with as many as twelve scholars within the time fixed by the grant; and it is expressly provided that *these donations should forever continue appropriated to the use of seminaries*, and the land having been sold and the money appropriated as directed, the grant is irrevocable, with the power existing on the part of the judiciary when called upon to see that the trustees of this fund, or of these grounds and the college, use it as a seminary for educational purposes, and to remove them by appointing others, upon their failure in good faith to carry out the purposes of the donation.

It is not contended that the State has the power to make an endowment or donation to a particular county or college for educational purposes, and then, by subsequent legislation, recall it. Here was a plain and certain donation, to these trustees and their successors forever, of this six thousand acres of land to Bracken Academy, and the proceeds (the land having been sold) were appropriated as directed by the Legislature, and so long as the seminary exists the fund belongs to these trustees, and the Legislature has no power to devote the building to common school purposes, or to vest in any common school district the title to this property.

Here was a contract with these trustees for a special purpose, and that was to enable them to have a seminary of learning in the County of Bracken. It was in fact designed to benefit the county, a like appropriation having been made to other counties, and to hold that the Legislature had the power to make this building and its grounds a part of the common school fund would be a perversion of the purpose of the original donation, and what is still more objectionable, would be giving this

Commonwealth v. Berry.

school fund or the buildings to one of the common school districts, when all would be entitled to the benefit of the law, if otherwise constitutional.

These trustees and their successors, having been holding this fund as donors, for the purpose contemplated, for nearly a century, were authorized to add to the original gift by obtaining private subscriptions and otherwise, and after a control for so long a period are told that the Legislature has divested them of title by transferring the right, use and title of the college and grounds to a school district. The act is clearly unconstitutional, and if the trustees are recreant to their duty, their conduct may be made the subject of judicial investigation. (Trustees of Dartmouth College v. Woodward, 4 Wheaton, 518; City of Louisville v. President, &c., University, 15 B. M., 671; Anderson v. Holland, &c., 14 Bush, 147; Trustees of Vincennes University v. State of Indiana, 14 Howard, 271.)
Judgment affirmed.

CASE 77—PETITION ORDINARY—APRIL 10.

Commonwealth v. Berry.

APPEAL FROM FRANKLIN CIRCUIT COURT.

95	443
108	514

95	443
el31	531

RELEASE OF SURETY IN SHERIFF'S REVENUE BOND.—Where a sheriff, upon motion of two of several sureties in his revenue bond, was required to execute an additional bond, the surety in the new bond had the right to suppose that the sureties in the original bond, other than those who had made the motion to be released, would be bound with him, there being nothing either on the face of the bond or in the records of the county court to vitiate the bond; and it turning out that those sureties were not bound because of the violation of an agreement made in open court that the bond was not to be finally

Commonwealth v. Berry.

approved until certain other persons had signed as sureties, the surety in the new bond is also not bound, the facts which operated to release the other sureties not being disclosed by the officer taking the bond.

WM. J. HENDRICK, ATTORNEY-GENERAL, AND R. REID ROGERS
FOR APPELLANT.

While to a certain extent the county court in receiving and approving a statutory bond must be held to an exercise of reasonable prudence and care, and the sureties have a right to presume that where the facts are sufficient to suggest inquiry concerning the proper execution of a bond the inquiry will be made, yet it is not incumbent on the county court to go out of the way and, in the self-appointed capacity of protector of the latter's interest, advise a surety of facts which he must already be presumed to know. (*Berry v. Franklin County*, 12 Ky. Law Rep.; *Brandt on Suretyship and Guaranty*, 408; *Murfree on Official Bonds*, 659; *Whitaker v. Crutcher*, 5 Bush, 623; *Hall v. Smith*, 14 Bush, 604.)

WM. LINDSAY AND JNO. W. RODMAN FOR APPELLEE.

The failure of the county judge to disclose to appellee the agreement with Smith and Anderson and its breach by him, resulting in their release, operates to release appellee. It is the duty of an officer taking an official bond to disclose to the sureties facts within his knowledge materially affecting the risk. (*Rawlings v. U. S.*, 4 Cranch, 219; *Chamberlain & Tapp v. Brewer*, 8 Bush, 562; *Hall v. Smith*, 14 Bush, 604; *Bracken County v. Daum*, 84 Ky., 388; 1 Story's Eq., sec. 215; *Graves v. Bank*, 10 Bush, 30; *White & Tudor's Leading Cases in Equity*, vol. 2, p. 707; *Commonwealth v. Yarbrough*, 84 Ky., 501.)

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

The State revenue bond of Hawkins, sheriff of Franklin County, dated December 11, 1880, and conditioned for the faithful collection of the State revenue for the ensuing year and the payment of same to the persons entitled to receive it, was signed by said sheriff and by John W. Jackson, Peter Smith, William Anderson and R. D. Armstrong as his sureties. By an order of the Franklin County Court, at its December term, December 20, 1880, this bond was filed and approved by the presiding judge of the court. On June 6th thereafter, in pursuance of notices given by Armstrong and Jackson, two of the

Commonwealth v. Berry.

sureties, the court required Hawkins to execute an additional bond on behalf of the State revenue, and providing indemnity for those making the motion to be released.

The appellee, by his attorney in fact, signed this additional or new bond as one of the sureties thereon, and upon Hawkins being sued upon it and the original bond, he pleaded that he was not bound by reason of a defect in the power of attorney. He succeeded below, but this court held the power of attorney sufficient. (See Commonwealth v. Hawkins, &c., 83 Ky., 246.) In the meantime, Smith and Anderson, the two sureties who had not taken any steps for indemnity, but who supposedly remained bound with Berry for the acts of Hawkins, filed their separate answers to the effect that when they signed the bond of December 11, 1880, the names of Henry Smith and W. A. Moore were in the body of it, and by agreement in open court the bond was not to be finally accepted or approved until these persons signed it, as well as G. W. Craddock, Wm. Risk and Thomas Scott, whose names were not in the body of it, but that in violation of the agreement with the presiding judge and in defiance of the express conditions upon which, in open court, they had signed the bond, the court had subsequently and without their knowledge accepted and approved it.

Upon the return of the case from this court, Berry set up, by amended answer, the facts developed by the answers of his co-defendants, Smith and Anderson, and claimed that the contract he had undertaken was to take the place of the dissatisfied sureties, Armstrong and Jackson, and stand bound for any default of Hawkins, in conjunction with Smith and Anderson, and that as by the act of

Commonwealth v. Berry.

the court the latter were released, he also was released. The demurrer of the Commonwealth to this amended answer was overruled by the lower court, and the State declining to plead further, the proceeding was dismissed as to Berry. From this judgment the Commonwealth has appealed.

The answers of Smith and Anderson, filed in February, 1883, setting up the facts pertaining to the execution of the bond of December 11, 1880, and its wrongful acceptance and approval, have never been replied to by the Commonwealth or denied in any form. It appears to be conceded that the plaintiff can not recover from these sureties, but it is manifest that but for the wrongful acceptance and approval of this bond, Smith and Anderson would have remained bound, in conjunction with those signing the new bond, for the default of Hawkins on the revenue bond for 1881. They took no steps to be relieved of any liability, and the court's order of acceptance and approval gave no intimation to Berry that the signers were only conditionally bound. We think Berry had the right to rely on this order accepting and approving the bond as indicating that although Jackson and Armstrong might get off upon their motion to that effect, yet that Smith and Anderson still remained bound in conjunction with him. This order of acceptance and approval was of record and showed for itself, but had he looked up the bond, he would still not have been put upon guard, for while incomplete, yet, subsequently to its date, it had been finally accepted and approved by the court, and there was nothing to show that this had been done in violation of an agreement that it was not to be so executed. There was nothing in the record or on the face of the bond to vitiate it. The records showed Smith and Anderson

Commonwealth v. Berry.

bound in June, 1881, when Berry acted, and he was entitled to know of the conditions, which, as later developments show, operated to release them.

If to the officer acting for the State, any facts were known which materially affected Berry, was he not entitled to know them? The case is thus aptly put by counsel for the appellee: It is manifest that the contract the Commonwealth is seeking to enforce is not the one that Berry intended to make or believed he had made. The contract sought to be enforced is an undertaking by Berry to answer for the default of Hawkins without regard to the joint liability of Smith and Anderson, who confessedly are not liable with him. The contract he intended to make and supposed he had made, and the contract as *prima facie* evidenced by the county court records, was that, in conjunction with Smith and Anderson, he (Berry) would answer for the default of Hawkins.

Upon abundant authority, the sureties Smith and Anderson seem to have been discharged from liability by the action of the county court (see recent case of Commonwealth v. Magoffin, &c., 15 Ky. Law Rep., 775), and if so, that action or agreement should have been divulged to the surety. Mr. Story thus puts it: "Thus if a party taking a guaranty from a surety conceals from him facts which go to increase his risk, and suffers him to enter into contract under false impressions as to the real state of facts, such concealment will amount to a fraud, because the party is bound to make the disclosure, and the omission to make it under such circumstances is equivalent to an affirmation that the facts do not exist." (1 Story's Equity Jurisprudence, sec. 215; Graves v. The Lebanon National Bank, 10 Bush, 23.)

Judgment affirmed.

 Nall, &c., v. Miller.

CASE 78—PETITION EQUITY—APRIL 12.

Nall, &c., v. Miller.

APPEAL FROM MARION CIRCUIT COURT.

1. **EQUITY WILL NOT IMPLY A PROMISE BY THE WIFE TO PAY THE HUSBAND FOR IMPROVEMENTS OR REPAIRS ON HER LAND**, while used and enjoyed by him in virtue of his marital rights, nor even for money advanced to remove an incumbrance from it. And the wife's land should never be subjected to satisfy the husband's demand for services rendered or money advanced on account of it, though such claim be founded upon an express agreement with her, if either he has received rents and profits of equal value, or she has left at her death sufficient personal estate to pay it.
2. **A VERBAL AGREEMENT BETWEEN HUSBAND AND WIFE**, whereby the husband was to retain possession and use of the wife's farm for his life after her death, in consideration of repairs and improvements made thereon during their coverture, is not enforceable, because it is within the statute of frauds, and also because it was without consideration, as the husband was not entitled to charge for improvements and repairs on the farm, the use and enjoyment of it being full compensation.

W. J. LISLE FOR APPELLANTS.

1. J. M. Miller, by his marriage with Eliza J. Ray, took a freehold interest in her lands, both by common and statute law. Whether that freehold would continue to him longer than her life depended, of course, upon the birth of a child. (Schouler on Domestic Relations, p. 142; Gen. Stats., p. 721.)
2. The husband had the right to manage and control the wife's farm affairs and was entitled to all the profits he could make, rent free. Marriage in Kentucky is something more than a mere statutory union. (Maguire v. Maguire, 7 Dana, 184.)
The fact that Mrs. Miller had been declared a *feme sole* did not lessen her husband's rights and obligations. The *feme sole* law should be strictly construed. (Bidwell v. Robinson, 79 Ky., 29.)
3. The profits received by the husband from the wife's lands and the personally received by him from her estate abundantly paid him for all improvements he put on the land.

A husband can not be paid for his work and labor unless the rents and profits of her lands were so increased by his labor and means as to exceed the necessities and comforts of the family. (Franklin *ex parte*, 79 Ky., 499; Wahl v. Murphy, 10 Ky. Law Rep., 388; Robinson v.

Nall, &c., v. Miller.

Huffman, 15 B. M., 82; *M. E. Church v. Jaques*, 1 Johns. Ch., 459; *Schouler on Dom. Rel.*, 165.)

4. The court properly rejected the husband's claim for money used in discharging a lien on the wife's land, as this discharge was for his own benefit; and moreover because she left ample personal estate to reimburse the husband for the outlay. (*King's Heirs v. Morris*, 2 B. M., 100.)
5. A life tenant can not lay out moneys in improving the estate and charge it to the inheritance. (*Caldwell v. Brown*, 2 Hare, 144; 4 *Rent's Comm.*, sec. 55, p. 84.)
6. The court properly rejected the claim for a life estate because the parties being husband and wife could not contract, and such a contract as is endeavored to be set up in this case is clearly within the statute of frauds.

LAFE S. PENCE ON SAME SIDE.

1. A husband can not charge for improvements made on the wife's land. (*Robinson v. Huffman and wife*, 15 B. M., 65; *Sparks' Adm'r v. Ball, &c.*, 13 Ky. Law Rep., 64; *Webster v. Hildreth and wife*, 78 Am. Dec., 682; *Burleigh v. Coffin*, 53 Am. Dec., 236; *Lewis v. Johns*, 85 Am. Dec., 49.)
2. The husband can not charge the wife with a sum paid by him to equalize the partition of land in which she had an interest. (*Snell v. Morris*, 2 B. M., 100; *Spree v. Hight*, 39 Am. Dec., 587; *Warren v. Brown*, 57 Am. Dec., 191.)
3. It was error to make the sum paid by the husband on the wife's turnpike subscription a lien on the land.

SAMUEL AVRITT FOR APPELLEE.

1. The contract relied on by appellee should be enforced. Contracts between husband and wife when fair and reasonable are upheld in equity. (*Latimer, &c., v. Glenn*, 2 Bush, 542; *Campbell, &c., v. Galbraith*, 12 Bush, 462; *Finlayson v. Finlayson*, 17 Oregon, 347; s. c., 11 Am. St. Rep., 836; *Hendricks v. Isaacs*, 15 Am. St. Rep., 625; s. c., 117 N. Y., 411; *Haussman v. Burnham*, 59 Conn., 117; s. c., 21 Am. St. Rep., 75.)
2. Creditors of the husband may reach improvements put upon the wife's land by the husband. (*Heck v. Fisher, &c.*, 78 Ky., 643.) And there can be no reason why the claim of the husband for remuneration for such improvements is not equally as strong as that of his creditors.
3. There is no reason why the rule applied to joint tenants in *Alexander v. Ellison*, 79 Ky., should not with equal fitness hold good between husband and wife.
4. Appellee should have been allowed a lien for the sum paid by him to equalize his wife and her sister in the division of the land. (*Thorpe v. Thorpe's Adm'r*, 3 Met., 372.)

Nall, &c., v. Miller.

5. The statute inhibiting resulting trusts in cases where the consideration is paid by one party and the conveyance taken to another does not prevent the party paying the money from recovering back the money paid, which is also regarded as a lien on the land. (*Martin v. Martin*, 5 Bush, 56.)
6. The turnpike subscription resulted in great benefit to the land, and no improvement did more to enhance its value. Therefore, appellee was properly allowed a lien on the land for the amount paid on that account.

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

July, 1864, J. M. Miller, having two children, under age, married Eliza J. Ray, who had none. And soon after he removed to her farm of one hundred and fifty acres, former homestead of her father, where they continued to reside until she died, in 1890, there being no issue of their marriage.

The controversy in this case is between him and her heirs at law about certain demands he makes against her estate, and an alleged contract with her he seeks to have enforced.

The account filed by him, running from 1865 to 1885, is for improvements and repairs on the farm; \$800 paid by him, in 1865, to her sister in order to equalize division of land left by their father; \$500 paid on her subscription of stock for a turnpike road, and \$70, price of an acre of land purchased for and conveyed to her, the whole amounting to about \$2,500. Purport of the alleged contract, being verbal, is an agreement by her for him, to retain possession and use of the farm for his life after her death, in consideration of repairs and improvements done thereon by him during their coverture.

The lower court adjudged him "entitled to \$900 on account of betterments of the farm, viz.: \$500 for turnpike stock, \$50 for cistern, and \$350 for repairment of

land outside the homestead," already set apart to him, and that the farm be sold to pay that sum. From that judgment the heirs at law have appealed, and he prays a cross-appeal.

It does not appear Eliza J. Miller ever agreed to pay or charge her land with payment for improvements or repairs put upon it, or for any money paid or services rendered by her husband. Indeed, such agreement is inconsistent with her alleged contract, according to which he was to have a life estate after her death, in consideration of the same improvements and repairs. There being then no agreement on her part to pay him for such services or advances of money, the law will not imply any. Nor do we see upon what principle of equity the judgment therefor was rendered and the farm left by her subjected to satisfy it. Equity will, under particular circumstances, give effect to a contract between husband and wife, even at his suit, if fair, just, and founded upon a valuable consideration; but will not imply a promise by her to pay him for improvements or repairs on her land while possessed, used and enjoyed in virtue of his marital rights, nor even for money advanced by him to remove an incumbrance from it. On the contrary, a presumption arises in all such cases, the consideration and motive of the husband was that he would be reimbursed by use and enjoyment of the land. (*King's Heirs v. Morris and Snell*, 2 B. M., 99.) And in our opinion the wife's land should never be subject to satisfy the husband's demand for services rendered or money advanced on account of it, though such claim be founded upon an express agreement with her, and however meritorious, if either he has received rents and profits of equal value

or she has left at her death sufficient personal estate to pay it.

In the case just cited there was, as here, a contest between the heirs at law of a married woman and her husband as to his right to be reimbursed out of land of which she died owner, the sum she was required under the will of her father to pay in order to get possession, and which he paid for her. There the court said: "If the \$1,600 be regarded as a personal debt of the wife *dum sola*, remaining unpaid until her death, her choses in action, uncollected at her death, would of course be liable for its payment. And if the husband could be regarded as becoming a creditor by paying the debt during the coverture, there would be no propriety in allowing him to charge the real estate in the hands of the heirs with the entire amount, so long as he had any assets in his own hands as administrator. Nor would there be justice in allowing this, although the debt be secured by lien on the real estate of the wife. And if the land were placed under lien for payment of this debt, before or during the marriage, and the husband, by paying the debt during coverture, acquired the benefit of the lien to any extent, we do not perceive on what principle he could claim to stand on a better footing than an ordinary tenant for life who, in discharging an incumbrance on the estate, is considered as discharging in part a burthen upon his own interest, and as having to that extent no just claim to remuneration. But we are of opinion that he was not entitled to charge the land to any extent for his reimbursement."

As said in the same case: "If a husband purchase an estate in name of his wife it shall be presumed in the

Nall, &c., v. Miller.

first instance to be an advancement or provision for her." And that rule is decisive against appellee's claim for the \$70 paid for the acre of land conveyed to his wife. For it is manifest he did not pay either that sum or the \$800 with intention to become a creditor of his wife, or of looking to her land for reimbursement. In that case the wife died, without issue born, in about one year after the marriage and a few weeks after her husband had advanced and paid the money, which would have made strong reason for a court of equity to reimburse him, but for the fact he had received by the marriage, in right of his wife, personalty of greater value than the sum paid for her. In this case there is no real or apparent hardship. For although, by reason of failure of issue of the marriage, appellee was not entitled to curtesy, he was entitled to, and did have and enjoy possession, control and profits of, his wife's land during a period of about twenty-eight years. He was insolvent at the time of the marriage, or became so in 1865, and had no place of abode for himself and infant children except that owned by his wife; and at her death the appraised value of her personal property that went into his hands as administrator was about \$4,500, after payment of all demands against her estate, to which he is entitled. It is true counsel now contends he was real owner of all the personalty, though caused by him to be appraised as hers. But that is not a material question; because if he actually owned it, the important fact is manifested that while she derived from her own land nothing more than subsistence, he had not only obtained a home and support during the entire period, but accumulated the surplus mentioned, which is more than amount of his account against the estate. It there-

Nall, &c., v. Miller.

fore seems to us there is no merit in any of his demands, and especially there is no ground upon which the land in question can be subjected to pay them. There is, however, an apparent difference between his demand on account of payment of the turnpike stock and the others. But the same reasons for denying his right to subject the land to pay the others apply to that demand. For if a wife's real estate may be charged with such expenditures by the husband, there would be little protection left the inheritance against his extravagant advances and expenditures for other purposes.

As to the alleged contract little need be said. In the first place it is by no means satisfactorily proved. Second, it is clearly within the statute of frauds and not enforceable. Third, it is without consideration; for appellee was not entitled to charge for improvements and repairs on the farm, the use and enjoyment of it being full compensation. But it appears that Eliza J. Miller was by judgment of court empowered, like a *feme sole*, to use, enjoy, sell her property, make contracts, etc. And it is therefore contended she was authorized to make the contract in question with appellee. It is not, however, necessary to here determine whether the statute was intended to empower a married woman to make valid and enforceable contracts with her husband; because, conceding Mrs. Miller was, appellee would have no more right than a stranger to enforce the contract in question, nor she or her heirs less right, than if sued by a stranger, to resist its enforcement, if it be invalid and not binding, as, for the three reasons mentioned, is clearly the case.

The judgment is reversed on the appeal and affirmed on the cross-appeal.

Bankston, &c., v. Crabtree Coal Mining Company.

CASE 79 PETITION ORDINARY TRANSFERRED TO EQUITY—
APRIL 12.Bankston, &c., v. Crabtree Coal Mining
Company.

APPEAL FROM HOPKINS CIRCUIT COURT.

1. **CONVEYANCE BY HUSBAND OF WIFE'S LAND— LIMITATION.**—Since the statute of 1846 the husband has had no vendible interest in the wife's land; and as a deed executed by the husband in 1871, attempting to convey the land of the wife, in which the name of the wife appeared only in the attesting clause, and then for the purpose, as recited, of relinquishing dower, must be regarded as the deed of the husband alone, it passed no interest to the grantees, and the wife's right of action accrued at once upon their entry.
2. **SAME.**—Where one to whom a cause of action for the recovery of land accrues is at the time under the disability of infancy or coverture, action can be brought after the lapse of fifteen years only in the event it is brought within three years after the removal of the disability. And where the disability is removed as much as three years before the expiration of the fifteen years, it would seem that the right to sue should be limited to fifteen years, as in cases where there has never been any disability. But even if three years after the expiration of the fifteen years is to be allowed, the action in this case is barred.
3. **SAME.**—If the conveyance in this case be regarded as one in which the wife "joined" within the meaning of section 6 of article 1, chapter 71, General Statutes, her right of action was barred after the lapse of three years from the removal of the disability, without regard to whether fifteen years had elapsed since the cause of action accrued, there being sufficient evidence to support the finding of the lower court that the plaintiff was twenty-one years of age at the time the deed was executed.

THOMAS G. POORE, AND **THOMAS H. HINES** FOR APPELLANT.

1. Mrs. Roden did not "join with her husband in the conveyance of her land," nor did she acknowledge any such conveyance, but expressly limits the instrument she signed with her husband to the release of dower. For this reason and the further reason that Mrs. Roden was under twenty-one years of age when she signed the deed with her husband, Roden, the three years statute does not apply. (Gen. Stats., chap. 71, art. 1, sec. 6; *Hatcher & wife v. Andrews*, 5 Bush, 561; *Hedger v. Ward*, 15 B. M., 116.)
2. A married woman can not divest herself of title to her realty in any

95	455
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Bankston, &c. v. Crabtree Coal Mining Company.

other manner than that prescribed in the statute, nor can the court undertake to reform a deed that she may have signed so as to make it conform to her supposed intention. (*Meler v. Blume*, 80 Mo., 184; *Schouler's Domestic Relations*, sec. 94, p. 151.)

3. Where the husband conveys the wife's land without her joining in the deed, the statute of limitations does not begin to run against the wife until she becomes discover, and then the statute must run fifteen years before the wife is barred of her right to recover the land. (*Stephens v. McCormick*, 5 Bush, 182.)

SOL. F. CLARK ON SAME SIDE.

1. The court erred in transferring the action to equity. (3 *Pomeroy's Equity*, sec. 1374; *Newman's Pleading and Practice*, 125, 239 to 241; *Bennett & wife v. Titherington*, 6 Bush, 70.)
2. Neither the deed nor the acknowledgment of the deed of a married woman can be reformed in equity. (*Abbott's Trial Evidence*, p. 174; *Williams v. Gutmen*, 53 Miss., 721, *Bishop on Contracts*, sec. 926; *Boone's Law of Real Property* (Pony series), sec. 374; *Butler v. Buckingham*, 5 Day, 492; *Dunlop v. Mitchell*, 10 Ohio, 117; *Bresser v. Kent*, 61 Ill., 426.)
3. A release of dower operates only by way of estoppel, and then only in behalf of the husband's purchaser. It can never take effect as a grant. (*Stewart's Husband and Wife*, sec. 272; *Reiff v. Horst*, 55 Md., 42, 47; *French v. Lord*, 60 Me., 527, 542; *Mallory v. Horan*, 12 Abb. Pr., N. S., 289, 295; *Ketzmeller v. Van Rensselaer*, 10 O. St., 68; *Robinson v. Bates*, 3 Met., 40; *Dearborn v. Taylor*, 18 N. H., 153.)
4. Limitation did not begin to run until the husband's death, and the action was not barred until fifteen years from that time. (*McLain v. Edwards*, 6 B. M., 210; 1 *Bishop on Married Women*, secs. 535, 537, 538, 568; *Miller v. Miller*, Meigs' Rep., 484; *Eaton v. Whittaker*, 18 Conn., 222; *Butterfield v. Beall*, 8 Ind., 208; *Bruce v. Wood*, 1 Met., 542; *McLain v. Gregg*, 2 Mon., 260; *Stephenson v. McCormick*, 5 Bush, 181; *Bailey v. Duncan*, 4 Mon., 260; *Merriman v. Caldwell*, 8 B. M., 33; *Miller v. Shackelford*, 3 Dana, 299; *Oldham v. Henderson*, 5 Dana, 256.)

**WADDILL & NUNN, C. J. WADDILL AND EDWARD W. HINES
FOR APPELLEE.**

1. Since the act of 1846 the husband has had no vendible interest in the wife's land, and therefore if the deed of April 13, 1871, be regarded as the deed of James H. Roden alone, it passed nothing, and the wife's right of action accrued at once. (*Johnson v. Sweat, &c.*, 81 Ky., 392; *Butler, &c., v. McMillan, &c.*, 88 Ky., 414.)
2. Limitation as to actions for the recovery of real property runs as to persons under disability, and the only difference between them and other persons is that the bar can not become complete as to them until three

Bankston, &c., v. Crabtree Coal Mining Company.

years after the disability is removed. If the disability is removed as much as three years before the expiration of the fifteen years, then the action is barred at the end of fifteen years as in other cases. (*O'Dell v. Little*, 82 Ky., 146)

3. Even if the cause of action is to be regarded as not accruing until the death of the husband, still the action is barred. Section 6, of article 1, chapter 71, General Statutes, was intended to cure all defects in the conveyances of married women after the expiration of three years from the death of the husband, and where the wife has, together with the husband, signed and acknowledged the conveyance, she must be deemed to have "joined" in it within the meaning of that statute. (*Hargis, &c., v. Ditmore, &c.*, 86 Ky., 653.)

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

On April 13, 1871, James H. Roden conveyed the land in controversy in this case to Geo. W. Woodruff, who took immediate possession, and under whom the appellee now asserts title.

The wife of Roden, however, was the real owner of the land, and was in fact paid the purchase money. She did not join in the deed save that in the attesting clause we find this language: "In testimony whereof, the said James H. Roden, together with Helen C. Roden, his wife, who hereby relinquishes all right to dower in and to the land conveyed in this deed, have hereunto subscribed," etc.

She signed and acknowledged the deed with her husband.

In 1883 James H. Roden died. His wife subsequently married Bankston, and in July, 1891, Bankston and his wife instituted their action in ejectment for the land in question. The court below dismissed their petition, upon the ground, as we presume, that their cause of action was barred by limitation, and whether it was or not is the sole question necessary to be determined on this appeal.

Section 1 of article 1, chapter 71, General Statutes, provides that "an action for the recovery of real property

Bankston, &c., v. Crabtree Coal Mining Company.

can only be brought within fifteen years after the right to institute it first accrued to the plaintiff, or to the person through whom he claims."

Section 2 of the same article provides that "if at the time the right of any person to bring an action for the recovery of real property first accrued, such person was an infant, married woman, or of unsound mind, then such person, or the person claiming through him, may, though the period of fifteen years has expired, bring the action within three years after the time such disability is removed."

It is evident that the entry of Woodruff was hostile to the title of the female appellant and his holding adverse to her. But for her disability she could have asserted her cause of action immediately upon his entry. This is true because she did not join in the grant, and as to her the deed of her husband was of no effect. That deed did not convey any right to the vendee. Since the statute of 1846, the husband has had no vendible interest in his wife's lands, and as the deed of 1871 must be regarded as his deed alone, the wife's right of action accrued at once.

In *Johnson, &c., v. Sweat, &c.*, 81 Ky., 392, it is said: "Prior to the adoption of that statute (1846) it had been held that the husband could sell and convey the land of the wife so as to be operative during the life of the husband, and consequently that in such case the wife's right of action did not accrue until the death of the husband." (Citing *Miller v. Shackelford*, 3 Dana, 292.) See also *Butler, &c., v. McMillan, &c.*, 88 Ky., 417.

But although her cause of action accrued in April, 1871, yet she was under the disability of coverture, and perhaps of infancy, and therefore she may institute her action in

spite of the lapse of fifteen years, provided she does so within three years after the time when her disability is removed. This removal was in 1883. And however we may compute the time, whether we give her fifteen years after 1871 and then three years thereafter, or limit her to fifteen years as in other cases, provided her disability was removed as much as three years before the end of the fifteen years, as would seem to be the correct method of computation, is immaterial. Her right of action is barred in either event.

Suppose, however, that we regard the conveyance as one in which the wife joined with her husband within the meaning of section 6 of the article and chapter referred to. That section provides that "if a woman, after she arrives at the age of twenty-one years, join with her husband in the conveyance of her lands or chattels real, and acknowledge the conveyance before an officer authorized to take her acknowledgment of the conveyance, no action shall be brought by her for the recovery of the lands or chattels real mentioned in such conveyance, unless the action is commenced by her within three years after she becomes discovert."

If the judgment below in bar of the appellant's rights was based on the limitation provided in this section, it was because the court found, as a matter of fact, that the wife had reached her majority when she executed the deed of April, 1871, and we think the evidence is abundant to support the finding. We have her statement in June, 1891, before she began asserting this claim, that she was then forty-two years old. We have also the positive recollection of her relatives and of her neighbors, who fix the date by other circumstances which were impressed on

Louisville & Nashville Railroad Company v. Copas.

their minds beyond doubt, that she was born December 25, 1849. Upon the removal of her disability therefore in 1883, she had three years only within which to have instituted her suit.

In any view of the case, therefore, the wife's cause of action was barred by limitation, and the judgment is affirmed.

CASE 80—PETITION ORDINARY—APRIL 12.

Louisville & Nashville Railroad Company
v. Copas.

APPEAL FROM WARREN CIRCUIT COURT.

1. RAILROADS—INJURY TO CAR-COUPLER FROM IMPROPER LOADING OF CARS.—Where a car-coupler in the yards of a railroad company is injured in coupling cars as the result of the gross neglect of those whose duty it was to load the cars properly, the company is liable.
2. WHERE THE PLAINTIFF FAILS TO REPLY TO A PLEA OF CONTRIBUTORY NEGLIGENCE the defendant is entitled to judgment on the pleadings, although the plaintiff may by direct averment in his petition have negatived any negligence on his part. But if the case is tried as if the issue had been made, and the attention of the trial court is never called to the failure to reply, the right of the defendant to make any objection to the verdict and judgment against him on that account is waived.
3. A MOTION BY THE DEFENDANT FOR A NON-SUIT IS A DEMURRER TO THE EVIDENCE ONLY and does not require the court to examine the pleadings, although if the court is, upon such a motion, apprised of the defendant's right to a judgment on the pleadings, it should grant the motion. But where the motion is overruled this court must assume, in the absence of anything in the bill of exceptions to the contrary, that the attention of the trial court was not called to the condition of the pleadings.

J. A. MITCHELL FOR APPELLANT.

1. Defendant's motion for a peremptory instruction should have been sustained, because the affirmative allegations of the facts constituting

95	460
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Louisville & Nashville Railroad Company v. Copas.

contributory negligence set up in the second paragraph of the answer are not denied. (Civil Code, sec. 126; *Depp v. L. & N. R. Co.*, 12 Ky. Law Rep., 366; *L. & N. R. Co. v. Schuster, &c.*, 10 Ky. Law Rep., 76; *Owen & McKinney v. L. & N. R. Co.*, 87 Ky., 626; *Favre v. L. & N. R. Co.*, 91 Ky., 541; *Cahill v. Cincinnati, &c., R. Co.*, 92 Ky., 345; *Cincinnati, &c., R. Co. v. Palmer*, 18 Ky. Law Rep., 783; 12 Am. St. Rep., 75 and note; *Maxwell on Code Pleading*, p. 557.)

The pleadings as well as the evidence are to be considered upon a motion for a peremptory instruction. (*Hall v. Durham*, 10 N. E. Rep., 581; *Adams v. Kennedy*, 90 Ind., 318; *Carver v. Carver*, 97 Ind., 497; *Wabash R'y Co. v. Williamson*, 104 Ind., 154; *White's Adm'r v. L. & N. R. Co.*, 15 Ky. Law Rep., 49.)

Cases explained and distinguished: *Hopkins v. Cothran*, 17 Ind., 173; *Foley v. Alkire*, 52 Mo., 317; *Whitney v. Preston* (Neb.), 45 N. W. Rep., 619; *Cooper v. Davis Machine Co.* (Kan.), 15 Pac. Rep., 235; *Kepley v. Carter, &c.* (Kan.), 30 Pac. Rep., 182; *Carpenter v. Ritchie* (Wash.), 28 Pac. Rep., 380.

2. The motion should have prevailed upon the testimony of the plaintiff, not only because he saw and knew that the steel rails projected beyond the end of the car, but also because he voluntarily went between the cars without order from his foreman or any one. (*Brice v. L. & N. R. Co.*, 10 Ky. Law Rep., 526.)

The case of *L. & N. R. Co. v. Robinson*, 18 Ky. Law Rep., 153, distinguished.

B. F. PROCTER AND EDWARD W. HINES FOR APPELLEE.

1. A motion for a peremptory instruction is merely a "demurrer to the evidence," and while the court may upon such a motion look to the pleadings to see whom they entitle to judgment, it is not bound to do so. (*Dallam v. Handley*, 2 Mar., 423; *Thompson v. Thompson*, 17 B. M., 29; *Wilsey v. L. & N. R. Co.*, 83 Ky., 516.)
2. The motion for a peremptory instruction not being equivalent to a motion for judgment upon the pleadings, the defendant waived its right to such a judgment by introducing evidence and by asking the court to instruct the jury upon the question of contributory negligence. (*Hopkins v. Cothran*, 17 Kan., 173; *McAllister v. Howell*, 42 Ind., 15; *J. S. Keaton Lumber Co. v. Thompson*, 144 U. S., 434; *L. & N. R. Co. v. Taylor*, 92 Ky., 55; *Elliott on Appellate Procedure*, secs. 480-482 and secs. 682, 687.)
3. In any event the right to a judgment, notwithstanding the verdict, was waived, because the defendant, instead of moving for such a judgment, moved for a new trial, which was inconsistent with the idea that it claimed the right to a judgment upon the pleadings. (*Schieble v. Hart*, 11 Ky. Law Rep., 607.)

Evans v. Stone, 80 Ky., 78, distinguished.

Louisville & Nashville Railroad Company v. Copas.

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

We perceive no reason for reviewing this case for the alleged error in refusing to grant the peremptory instruction. The plaintiff had made out his case. In the discharge of his duty he had been seriously injured by reason of the gross neglect of those whose duty it was to load the cars properly, and could not by the exercise of the utmost diligence have avoided the injury inflicted by the projecting rails in the attempt to couple the cars.

The instructions made the company liable in the event the injury was the result of gross negligence on the part of the employes of the road, and the only question necessary to be considered arises from the failure of the plaintiff (appellee) to reply to the plea of contributory neglect. The plaintiff in his petition had by direct averment negatived any negligence on his part, still it was incumbent on the defense to rely by plea on such contributory neglect on the part of the plaintiff as brought about the injury, and but for which the accident would not have happened.

Here was affirmative matter that required a reply, and the defendant was entitled to a judgment on the pleadings. Was its right to such a judgment waived by failing to make a motion for such a judgment? It is not pretended that any reply was filed or offered to be filed, and, even upon the motion for a peremptory instruction, the court would have been compelled to sustain the motion, if apprised of the condition of the pleadings; but the court was not required to examine the pleadings for that purpose, unless some motion was made for a judgment on that ground.

A motion for a *non-suit* is a *demurrer* to the evidence

only, and where the bill of exceptions fails to show a motion for a judgment on the pleadings or that the court's attention was called to the failure to reply to the answer as one of the grounds for the motion, this court must necessarily assume that the motion for a non-suit applied alone to the evidence. The court below had no opportunity of passing on the question so as to determine the necessity for a reply, but on the contrary, instructions were asked by defendant, and given, as if the issue on the plea had been fully made up, and after verdict the motion for a new trial was based only on the usual grounds, and at no time was it claimed that the pleadings were so defective as to authorize a judgment for the defendant, the evidence sustaining the charge of negligence made by the plaintiff.

We can determine what took place below during the progress of the trial only from the record, and therefore can not assume that a demurrer to the evidence brought up the question as to the sufficiency of the pleadings. The case was tried as if the issue was made, and the right to a reply by the plaintiff to the answer waived.

Judgment affirmed.

Whalen v. Nisbet, &c.

CASE 81—PETITION ORDINARY—APRIL 22.

Whalen v. Nisbet, &c.

APPEAL FROM LYON CIRCUIT COURT.

1. **EVIDENCE AS TO DECLARATIONS OF DECEDENT.**—One who claims land as devisee under a will may, for the purpose of showing the testator's title, prove the declarations of the testator as to a matter of pedigree, subsection 2 of section 606 of the Civil Code not being intended to render such testimony incompetent.
2. **WHERE A WILL WHICH HAS BEEN PROBATED IN ANOTHER STATE** is admitted to probate as a will of realty by a county court in this State upon a copy of the will and of the certificate of probate, the order of the county court is conclusive, except as to the jurisdiction of the court, "until the same is superseded, reversed or annulled," just as in the case of a domestic will; and the fact that the copy upon which the probate was had in this State does not show upon what proof the will was admitted to probate by the foreign court, does not render the order of the county court void.
3. **WHERE A WILL HAS BEEN PROBATED IN ANOTHER STATE** and a copy of the will and of the certificate of probate are offered for probate in a county court in this State, proof that the State in which the will was probated had a statute like section 5 of our statute of Wills (chapter 118, General Statutes), which prescribes the requisites of a valid will, is sufficient to authorize the county court to probate the will as a will of realty. But it is immaterial in this collateral proceeding what proof was heard by the county court upon the motion to probate, the order of that court being conclusive until set aside.
4. **IT IS COMPETENT TO PROVE THE STATEMENTS OF DEAD PERSONS** as to where corner and line trees which are gone originally stood, and also to show the relative location and calls of adjoining surveys patented subsequent to the date of the patent in question.

T. J. WATKINS FOR APPELLANT.

1. The testimony of Henry A. Nisbet, one of the appellees, as to statements of his deceased father and aunt were incompetent. And the fact that those statements related to "pedigree" does not alter the rule. (Subsection 2, of sec. 606, Civil Code; *Hurry v. Kline*, 14 Ky. Law Rep., 330.)
2. Much of the testimony of this witness would be inadmissible as "pedigree" even if testified to by a competent witness.

The term "pedigree" includes descent, relationship, the facts of birth, marriage and death, and the times when these events happened.

Whalen v. Nisbet, &c.

- (1 Greenleaf, sec. 104.) But does not include the *place* of birth, marriage, etc. (Brooks v. Clay, 3 Mar., 550; Shearer v. Clay, 1 Litt., 266.)
3. A county court of this State has no jurisdiction to admit a foreign will to probate as a will of real estate in this State, unless it appears from the copy of the record of the foreign court that the will was proved in the foreign court of probate to have been so executed as to be a valid will of lands in this Commonwealth by the law thereof. (Gen. Stats., chap. 113, sec. 8; Williams v. Jones, 14 Bush, 418.)
 4. It was error to permit a patent and survey to be read to the jury for the purpose of showing the boundary of a prior survey. (Ewing v. Savary, 3 Bibb, 235.)
 5. Hearsay testimony as to the location of corner and line trees was incompetent. (Wickliffe v. Everson, 9 B. M., 266; Young v. Adams, 14 B. M., 132; May v. Jones, 4 Litt., 22; Shackelford v. Smith, 5 Dana, 240; Beatty v. Hudson, 9 Dana, 322.)

F. A. WILSON AND F. W. DARBY FOR APPELLEES.

1. Declarations of dead persons which go to show pedigree may be proved by any witness as independent facts, whether party in interest or not, and are not such verbal statements of or transactions with a deceased person as may not be proved under section 606, Civil Code. (Flood v. Pragoff, 79 Ky., 607; Wharton on Evidence, 464.)
2. The location of adjoining tracts of land may be shown to throw light on location of tract in question.
3. Statements of parties interested in question of title and boundary made while in possession are competent where the person making them is dead at the time the statements are offered to be proved. And boundary may be proved by reputation. (Smith v. Shackelford, 9 Dana, 464; Smith, &c., v. Prewitt, 2 A. K. Mar., 156; Cherry, &c., v. Boyd, Litt. Sel. Cases, 8.)
4. The county court admitted the wills to probate both as wills of personalty and realty upon the record itself and the Virginia Statutes, and whether this was a correct adjudication or not it was an adjudication by a court having jurisdiction, and is conclusive until appealed from and reversed. (Arterburn's Ex'or v. Young, 14 Bush, 513; Barnes v. Edwards, 17 B. M., 640; Abbott, &c., v. Traylor, &c., 11 Bush, 336; Thompson v. Beadles, &c., 14 Bush, 47; Williams v. Jones, 14 Bush, 424.)
5. The judgment of the county court was correct. The Virginia Statute in regard to the attestation of wills is, and has always been, the same as ours in its requirements and *almost* identical in words. (Virginia Code of 1860.) And it was competent for the county court to consider this statute as well as the statute of Kentucky in force at time of probate, and to construe the record in the light of the statute under which it was made. (Williams v. Jones, 14 Bush, 424.)

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

Appellees brought this suit to recover of appellant land of which he is in possession, but alleged by them to be within boundary of a tract of 2,666 $\frac{2}{3}$ acres, for which a patent was in 1789 issued by the Commonwealth of Virginia to James Kemp, under whom they claim title as follows: That he having died intestate the land was inherited by his sister and only heir-at-law, Isabella K. Nisbet, who, surviving her husband, devised it to her son, Archibald Nisbet, who devised it to his brother, William Nisbet, by whom it was devised to appellees, his children. The only claim of title to the land in dispute is made by appellant under a patent issued in 1888 by Commonwealth of Kentucky to Culp, his immediate vendor. Consequently it is manifest appellees are entitled to recover upon showing derivation of title in the manner mentioned, and that the land in controversy, or any part thereof, is covered by the patent of 1789. Indeed, the only errors of the lower court complained of are in admitting incompetent evidence of these two facts.

Death of James Kemp, intestate, and without other heir-at-law than his sister, Isabella K. Nisbet; the fact that she was mother of Archibald and William Nisbet, and survived her husband, are shown by declarations of William, to which one of appellees, his son, testified as a witness, and at same time exhibited to the jury a family Bible in which is a record of births, deaths and marriages, that he swore his father declared had been kept by and received from Isabella K. Nisbet.

That testimony comes within the well-settled rule admitting hearsay evidence in cases of pedigree, and is sufficient to satisfactorily show Isabella K. Nisbet inher-

ited the land patented to her brother, James Kemp, especially when considered in connection with the great length of time, more than sixty years, during which she, as such heir-at-law, without dispute claimed and exercised ownership of it; for it appears she sold and conveyed title, that has never been called in question, to a part of it as early as 1832. But it is contended such evidence is made incompetent by subsection 2, section 606, Civil Code, which provides that no person shall testify for himself concerning any verbal statement of one who is dead when the testimony is offered to be given, except for the purpose and to the extent of affecting one who is living and who heard such statement.

In our opinion that provision has application to testimony, original in character, given in an action by one party to the prejudice of another party claiming under or through a dead person whose statement is offered to be proved; not to testimony concerning a declaration of a dead person as to a matter of pedigree that is, though hearsay in character, made, according to long established rule, competent from necessity.

The next error complained of is that the several papers purporting to be wills of Isabella K. Nisbet and Archibald Nisbet, probated in the State of Virginia, and of William Nisbet, probated in the State of Missouri, were improperly admitted as evidence of the title of appellees.

Section 30, chapter 113, General Statutes, is as follows: "When a will of a non-resident relative to estate within this Commonwealth has been proved without the same, an authenticated copy and the certificate of probate thereof may be offered for probate in this Commonwealth. When such copy is offered, the court to which it is offered

shall presume, in the absence of evidence to the contrary, that the will was duly executed and admitted to probate as a will of personalty in the State or country of the testator's domicile, and shall admit such copy to probate as a will of personalty in this Commonwealth. And if it appears from such copy that the will was proved in the foreign court of probate to have been so executed as to be a valid will of lands in this Commonwealth by the law thereof, such copy may be admitted to probate as a will of real estate."

In *Williams v. Jones*, 14 Bush, 418, where that section was construed, this court held that "in order to entitle the will to probate here as a will of real estate, it must appear from the foreign transcript not only that the will was admitted to probate in the foreign court, but that the evidence heard there was such that if it were introduced here it would authorize the probating of the will under our laws."

The facts necessary to render a will of either lands or personalty in this State valid, are prescribed in section 5, chapter 113, as follows: "No will shall be valid unless it is in writing, with the name of the testator subscribed thereto by himself or some other person in his presence and by his direction; and moreover, if not wholly written by the testator, the subscription shall be made or the will acknowledged by him in the presence of at least two credible witnesses, who shall subscribe the will with their names in the presence of the testator."

There can be no question of competency as evidence of the will of William Nisbet; for an authenticated copy of it and of the certificate of probate show all facts required by section 5 were proved in the Probate Court of

Missouri, where he was domiciled. But it does not appear from the copy and certificate of probate of the will of either Isabella K. Nisbet or Archibald Nisbet, that any distinct fact required by that section was proved in the court of Virginia, where they were domiciled. The order probating the will of the former recites merely that the last will and testament of Isabella K. Nisbet, deceased, was on a day named fully proved by the oaths of three witnesses thereto, their names being given, and was thereupon ordered to be recorded. And the order probating the will of Archibald Nisbet does not appear more explicit or extended. But a copy of each will, accompanied by a certificate of probate, was admitted to record by the Lyon County Court, where the land is situated. And the question is thus presented, whether they were thereby rendered valid wills of real estate, and, as a consequence, competent evidence of title in this case.

Section 28 provides that "no will shall be received in evidence until it has been allowed and admitted to record by a county court; and its probate before such court shall be conclusive, except as to the jurisdiction of the court, until the same is superseded, reversed or annulled." Whether that section was intended to apply to a foreign will probated here under section 30 was considered, though not expressly decided, in *Williams v. Jones*, this language being there used: "When a foreign will is presented it may be admitted to probate as a will of personalty or as a will of realty, or as a will of both; and the statute would seem to require that the order of probate should show whether it was admitted as a will of personalty or of realty also, and when the order does so show it will probably be conclusive." We now perceive no reason for

holding such order of probate conclusive as to a domestic will whereby title to real estate passes, that does not equally apply to foreign wills when admitted to probate by order of a county court of this State as will of realty. The language of the section first quoted does not authorize any discrimination. And it can not be fairly presumed the Legislature intended to make titles to land uncertain and insecure merely because acquired under foreign wills.

The Lyon County Court, as appears from the record before us, after reciting in its order that a copy of the will of Isabella K. Nisbet, and certificate of probate in Virginia court, were presented and evidence had been heard, in express terms adjudged said copy be probated and admitted to record in that court as her last will and testament, as to both personal and real estate in Kentucky. And the same proceeding was substantially had and order made in that court as to will of Archibald Nisbet. And as neither order has been superseded, reversed or annulled, there was, it seems to us, no alternative for the circuit court but to treat both orders as conclusive of validity and competency as evidence of the two wills. It is true it does not appear what character of evidence was heard by the county court on motions to probate the two wills, nor is it within province of this or the circuit court to inquire; though in our opinion proof the statute of Virginia contained a provision like section 5 of our statute of wills would have fully authorized the orders made by the Lyon County Court. Identity and location of the survey patented to James Kemp was satisfactorily shown on trial of this case, but there does not appear to be now any marked line or corner trees on the southern boundary of the tract. And another alleged error of the lower court

Gibbs v. Board of Aldermen of Louisville.

was in permitting testimony as to relative location and calls of adjoining surveys, patented subsequent to date of Kemp's patent, and proof of statements of persons dead as to where corner and line trees, now gone, originally stood. It seems to us that character of evidence is entirely competent, and has been often so recognized by this court.

Judgment affirmed.

CASE 82—MOTION—APRIL 26.

Gibbs v. Board of Aldermen of Louisville.

APPEAL FROM JEFFERSON CIRCUIT COURT, COMMON PLEAS DIVISION.

WRIT OF PROHIBITION—EFFECT OF SUPERSEDEAS ON TEMPORARY PREVENTIVE ORDER.—Where a writ of prohibition is denied by the trial court on final hearing, an appeal with supersedeas does not continue in force, pending the appeal, a temporary preventive order prohibiting the inferior tribunal from acting until the application for the writ could be heard. The court is not inclined to extend to writs of prohibition the rule which continues in force a temporary injunction where an appeal is prosecuted with supersedeas from an order dissolving the injunction on final hearing; and especially so in view of the fact that a statute has been enacted changing that rule and leaving to the discretion of the trial judge, in each case, the entire question as to leaving the temporary injunction in force pending the appeal. And while that statute has not yet gone into effect, it should, as far as practicable, be followed.

HARGIS & TURNER, JR., FOR APPELLANT.

The supersedeas has the effect to suspend the judgment dissolving the temporary preventive order and all proceedings until this appeal is determined. (Smith v. Western Union Telegraph Company, 88 Ky., 269; Elizabethtown, &c., R. Co., v. Ashland, &c., Street R. Co., 15 Ky. Law Rep., 258; Barker v. Edlin, 9 Ky. Law Rep., 971; Runyan v. Bennett, 4 Dana, 599; Yocum v. Moore, 4 Bibb, 221.)

H. S. BARKER FOR APPELLEES.

As there never was a writ of prohibition there is nothing to be stayed by the supersedeas except the execution for costs. The life of the tem-

Gibbs v. Board of Aldermen of Louisville.

porary preventive order ended when the motion for a writ was disposed of. (Civil Code of Practice, secs. 476, 474, 445, 447.)

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

The Board of Aldermen of the city of Louisville were proceeding to investigate certain charges and specifications preferred against F. H. Gibbs, a park commissioner of that city, with a view of removing him from office if the charges made were sustained, when the latter, in a proceeding by motion, accompanied by a petition authorized by section 474 of the Civil Code, obtained a preventive order prohibiting that board from proceeding with the investigation until the motion was decided. The Board of Aldermen appeared to the motion, filed a demurrer to the petition, and upon the hearing the writ was denied. The applicant for the writ then prayed an appeal to this court and executed a supersedeas bond in the court below in the ordinary form. He now applies for a rule against the Board of Aldermen to show cause why they should not be punished for contempt in disobeying the supersedeas, alleging their purpose to proceed with the investigation of the charges regardless of the supersedeas.

What was there for the applicant to supersede in the present inquiry? The court below had denied the writ and left the applicant without the relief sought. The intervening order was not, in fact, a writ of prohibition, but a command from the court to the Board of Aldermen to stay all proceedings until it could be determined whether or not the plaintiff was entitled to the writ.

The writ was not allowed to go, and the applicant, by a supersedeas, is attempting to obtain relief the court denied him. It is like superseding a judgment denying

to the plaintiff the right of recovery in an action of debt with no lien created by attachment or otherwise on the property of the defendant, or to obtain an injunction when the court has refused to grant it. The case of *Smith, &c., v. Telegraph Co.*, reported in 83 Ky., 269, and other cases are referred to by counsel establishing the rule that, where an injunction has been granted and finally dissolved, a supersedeas restores the injunction, or its effect, until the case is disposed of on the appeal. Such cases bear some analogy to the case before us, but the rule recognized by them is at variance with the practice and judicial determinations upon such questions by the courts of other States; and the Legislature, at its last session, doubting the wisdom of the rule in this State as to the effect of a supersedeas in cases where injunctions have been modified or dissolved, passed an act providing that "when an appeal shall be taken from any judgment granting, modifying, perpetuating or dissolving any injunction, the court which rendered the judgment may, in its discretion, if the ends of justice so require, at the time the appeal is taken, make an order suspending, modifying or continuing the injunction during the pendency of the appeal," etc., and also providing that the provisions of the Civil Code, concerning supersedeas on appeals, shall not apply to judgments granting, modifying, perpetuating or dissolving injunctions.

The entire question as to the retention of the injunction until the appeal is disposed of, is left to the discretion of the trial judge, who is familiar with the facts and the parties, and can perceive the danger that may happen to the rights of the litigants if there is an entire suspension of the injunction during the pendency of the appeal.

Gibbs v. Board of Aldermen of Louisville.

This amendment to the Code will operate to prevent the hardships that litigants often sustain by reason of an injunction being made effective during an appeal, or by reason of the entire suspension of the writ after judgment in the court below until disposed of by this court. The trial judge is now left to protect the interest of litigants in such cases, and while the act was approved on the 19th of March, 1894, and is not operative until ninety days after the adjournment of the session at which it was passed, it is an amendment to the Code, wise in its provisions, and should, as far as practicable, be followed.

The writ of prohibition is the order from the superior to the inferior court of limited jurisdiction, prohibiting the latter from acting in a matter out of its jurisdiction, and, by section 475 of the Code, the granting or the refusal of the writ is the final order, and when the final order is entered, the temporary preventive order has no longer any force in this or any other court, and the final order being a denial of the writ, the supersedeas affects only the question of costs. The preventive order was only intended to protect the litigants until the court could determine whether or not he was entitled to the writ of prohibition, and the court having denied the writ, the effect of a mere preventive order can not be revived by a supersedeas so as to make the writ of prohibition effective during the pendency of the appeal.

This court, in the case of injunctions, had some doubt as to the efficacy of the rule when established, and is not disposed to extend it by applying it to writs of prohibition, because a temporary order had been issued for the protection of the litigant until his case could be heard. He has applied for relief and it has been denied

McBrayer, Ex'or, v. McBrayer's Ex'trix.

him, and his only remedy is by an appeal, without a supersedeas except as to costs. The court does not mean to pass on the merits, or to adjudge in any manner that the court below had the jurisdiction to interfere with the trial in progress before the Board of Aldermen.

The rule is refused.

CASE 83—PETITION EQUITY—APRIL 26.

McBrayer, Ex'or, v. McBrayer's Ex'trix.

APPEAL FROM ANDERSON CIRCUIT COURT.

1. **CONSTRUCTION OF DEVISE—PROHIBITION OF USE OF TESTATOR'S NAME IN CONNECTION WITH DISTILLERY.**—Where a testator, who owned a large distillery which he devised to his infant grandchildren, provided that the distillery should be operated by his executors for three years after his death in order to pay various bequests made by his will, "after which time I desire that my name be extinguished from the business," the words quoted were not intended to prohibit the devisees from using a valuable trade-mark of which the testator's name formed a part, and which he had used for many years, but merely to prohibit the use of his name in the operation of the distillery, after the expiration of the three years, in any way that might make his estate liable.
2. **SAME.—EXTRINSIC EVIDENCE AS TO TESTATOR'S INTENTION.**—What the testator may have said before or after the making of the will can not be looked to in its construction. The will must speak for itself.
3. **SAME.**—While the court perceives nothing illegal or contrary to public policy in a prohibition by the testator of the use of the trade-mark or of the use of his name in connection with the manufacture of whisky, it is not necessary to determine the question as to the validity of such a prohibition.
4. **SAME.**—A provision in the will that if at any time the executors shall disagree as to the best method of settling up, managing and disposing of the testator's estate, the view held by the widow "shall in all cases be adopted," does not authorize the executors to adopt the widow's construction of the will without regard to the intent of the testator.

McBrayer, Ex'or, v. McBrayer, Ex'trix.

HUMPHREY & DAVIE FOR APPELLANT.

1. The proper construction of the will is that the testator wished his "business" to be carried on in his name, and at the risk and profit of his estate, for three years after his death; and then the "business" was no longer to be carried on as his, and at the risk of his estate. It does not require a destruction of the value of the distillery by the destruction of its name and trade-mark.
2. The acts of the testator, in operating the distillery himself, under its name of "W. H. McBrayer Cedar Brook Distillery" for two years after writing his will and up to the day of his death, and in providing for its operation in his name by his son-in-law for three years after his death, and in devising it to his heirs to be operated afterward by them, show that he did not write his will under any "remorseful conscience" against his life-work of distilling, nor from any fear that his son-in-law or his descendants would "injure his reputation" as a distiller.
3. There is nothing unlawful or against public policy or deceptive to the public in his heirs calling their distillery, and branding its product, with the distillery's name, "W. H. McBrayer Cedar Brook Distillery;" the "business" of distilling and selling being carried on by his heirs, in their own names, and at their own risk. (*Dant v. Head*, 90 Ky., 261; *Hageman v. Hageman*, 8 Daly, N. Y., 10; *Coddington's Digest Trade-marks*, secs. 12, 21, 165; *Pepper v. Labrot & Graham*, 8 Ky. Law Rep., 125; *Leather Cloth case*, 11 House of Lords Cases, 523; *Kidd v. Johnson*, 100 U. S., 617; *Pratt's Appeal*, 2 Am. St. Rep., 679; *LePage v. Russia*, 51 Fed. Rep., 941.)
4. To forbid the descendants of Judge McBrayer from using the distillery's name and brand, would simply throw it open to the public to adopt and make inferior whisky under that brand; a thing the testator could not have intended. (*Clark v. Freeman*, 11 Beavan, 112; *Levy v. Walker*, Law Rep., 10 Chancery Division, 486; *Day v. Brownrigg*, Law Rep., 10 Chancery Division, 294.)
5. The language of the will, with regard to the use of the testator's name, is directory, not mandatory. (2 *White & Tudor's Leading Cases in Equity*, 859; *Farris v. Rogers*, 9 Ky. Law Rep., 912; *Jarman on Wills*, vol. 1, p. 682, note.)
6. To construe the will as directing the distillery of the heirs to be dismantled of its name, and as requiring their trade-mark to be destroyed, three years after the testator's death, would be to make the will interfere with the essential enjoyment and use by the heirs of their property, and such interference would be repugnant and void. (*Coffman v. Coffman*, 17 Am. St. Rep., 70; *Boiseau v. Aldridge*, 27 Am. Dec., 595; *Jarman on Wills*, R. & T.'s edition, vol. 1, pp. 619, 620, vol. 2, pp. 526, 538; 4 *Kent's Comm.*, 131; *Woerner's Law of Administration*, vol. 2, secs. 441, 442; *Connor v. Couch*, 141 U. S. 317; *Beach on Wills*, secs. 228, 241; *Redfield on Wills*, vol. 2, p. 287.)

McBrayer, Ex'or, v. McBrayer, Ex'trix.

7. In case of doubt, the will should be construed in the way that will prevent hardship and prevent the destruction of the estate of the infants. (Brearly v. Brearly, 9 New Jersey Equity; 1 Stockton, 21; Beach on Wills, sec. 817.)

L. W. MCKEE OF COUNSEL ON SAME SIDE.

D. W. LINDSEY FOR APPELLEE.

1. The intention of the testator was that after the expiration of three years from his death his name should not appear upon or in connection with the distillery or the whisky thereafter made, or in any manner in the business, and such is the meaning of the words used.

In construing a will greater regard is to be had to the clear intention of the testator as gathered from the whole instrument than to any particular words used in the expression of that intention. (Ford v. Buch, 11 Q. B., 864.)

2. The condition imposed is not repugnant to the estate devised, nor is it contrary to public policy. (Bassett v. Budlong, 18 Am. St. Rep., 404; Plumb v. Tubbs, 41 N. Y., 442; Sutton v. Head, 86 Ky., 156; Grundy v. Edwards, 7 J. J. M., 368; Turner v. Johnson, 7 Dana, 435; Printing and Numerical Registering Co. v. Sampson, 19 Eq., 462-465.)
3. If a legatee upon condition accept the legacy and enter into possession, he must perform the condition, however burdensome. (2 Redfield on Wills, chap. 2, sec. 3, p. 281.)
4. The trade-mark was but an incident of the distillery and could not have been devised by the testator separately. Therefore, to forbid its use is not to destroy property. (Manhattan Medicine Co. v. Wood, 108 U. S., 223; Dixon Crucible Co. v. Gugenheim, 2 Brewster, 321; Lockwood v. Bostwick, 2 Daly, 521.)
- Kidd v. Johnson, 100 U. S., 617, explained.

W. LINDSAY OF COUNSEL ON SAME SIDE.

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

This action was instituted in the court below for a construction of the ninth clause of the will of Judge W. H. McBrayer, of Anderson County, who died on the 6th of December, in the year 1888.

He left surviving him his widow, who is the plaintiff in the action and the appellee in this court. She qualified as executrix, and also his son-in-law, D. L. Moore, qualified as executor.

McBrayer, Ex'or, v. McBrayer, Ex'trix.

The testator had but one child, a daughter, who died before the testator, leaving three children—Mary, Wallace and William Moore—and these children, by the provisions of the will, are made the principal objects of his bounty. Their father was D. L. Moore, who was left as executor to manage the estate in conjunction with the widow of the testator.

He made a liberal provision for his wife, and also bequests of much value to his son-in-law and to his collateral kindred.

At the time of his death, and for many years prior thereto, he manufactured and sold whisky at his distillery in the County of Anderson. Its product was much used, and the trade-mark on the barrels so extensively known as to give the use of the trade-mark itself a value of not less than \$25,000 a year. The trade-mark was "W. H. McBrayer Cedar Brook Distillery," and of the value, as conceded by the pleadings, of a sum exceeding \$200,000.

The testator's property, when the specific devises were paid, consisted almost entirely of this noted distillery, and this, by the residuary clause of the will, passed to his infant grandchildren.

He had made a contract sometime before his death with Levy & Bro., of Cincinnati, by which he sold them all the whisky distilled and to be distilled at the "Cedar Brook Distillery" between December 1, 1886, and December 1, 1891. This contract had to be complied with, and not only so, it was evident the distillery had to be operated in order to raise the money to satisfy the specific devises made to his kindred other than those who were his direct descendants. The distillery was operated under his own supervision for more than a year after the will was writ-

McBrayer, Ex'or, v. McBrayer, Ex'trix.

ten, and by its provisions it was to be operated by his executor for *three years* from the time of his death.

He was a man of large business experience and knew the necessity of having the distillery carried on by his executor until from its products the executor could discharge the burden upon his estate imposed by the provisions of his will. With this in view we find the ninth clause of the will, now the subject of construction, to read as follows: "It is my will that my Cedar Brook Distillery shall be operated by my executors for *three years* after my death in order to carry out the bequests of this will, *after which time I desire that my name be entirely stricken from the business*, and my executors are hereby invested with all the rights, title and interest in said property necessary to the operating of the same, so that no trouble will or may be had with the Government of the United States by reason of my said executors operating said distillery after my death."

By the thirteenth clause it is provided that "If at any time my executors shall disagree as to the best method of settling up, managing and disposing of my estate, the view held by my said wife shall in all cases be adopted, it being my desire to give her prominence and priority in everything that pertains to my estate."

It is claimed by the widow—and such was the ruling of the chancellor below—that by the provisions of the ninth clause of the will the trade-mark or brand attached to the product of the distillery, viz.: "*W. H. McBrayer Cedar Brook Distillery*," could not longer be used by his grandchildren in the manufacture or sale of the whisky at said distillery or elsewhere because of the provision in the ninth clause of the will of the testator, by which the

McBrayer, Ex'or, v. McBrayer, Ex'trix.

distillery is to be operated for three years by his executors after his death, to carry out the bequests of the will, "*after which I desire that my name be entirely stricken from the business.*" It is insisted, from the language used, the purpose of the testator was that the name of W. H. McBrayer should no longer be connected with the distillery, and the trade-mark that gave the product of the distillery and the devise its chief value was thereby destroyed. In other words, the true meaning of this ninth clause is that after the expiration of the three years from the death of the testator his name was not to appear as a part of the brand or trade-mark and to be in no manner connected with the business.

On the other hand it is contended for the appellants the testator's meaning was that after the expiration of the three years (the time in which the distillery was to be operated by his executors), his estate or his executors should no longer conduct the business by using his name so as to make his estate liable, etc. It is again argued that the name "W. H. McBrayer Cedar Brook Distillery," is a valuable property right, which neither the executors nor the testator himself could destroy, and for that reason it passed to the devisees.

It is not necessary, in view of the conclusion reached, to determine the right of the deviser to prohibit the use of the trade-mark, or that of his name, in the manufacture of whisky by those to whom he devised the distillery, and while we perceive nothing illegal or inconsistent with public policy in such a prohibition, although made a condition upon which the devise is to take effect, it is not required that this question should be further considered.

The testator could have had no conscientious motives

prompting him to restrict the devise. He had been a distiller for many years and had, without doubt, devised to these grandchildren the distillery property that it might be used and operated for the purpose of making whisky, and if regarded by him as an evil he would not knowingly have vested them with the title to property which, when applied to its proper use, would have produced that which the testator was not willing to have his name associated with in any form. He was a man of intelligence and of much experience in the business affairs of life, and in the construction of his will we must look to the language used and the circumstances surrounding him as gathered from the writing itself in order to determine his intent and purpose when using the language found in the ninth clause of that instrument. He knew that to give to his executors as such the unlimited power as to time in which to operate the distillery might involve his estate largely in debt, and looking to the liabilities or the burdens he had placed upon the estate by the various bequests made, and knowing the capacity of his distillery, supposed that in three years from his death, with proper management by his executors (in whom he seems to have had the greatest confidence), the distillery would relieve his estate of the burdens upon it, and after that period he did not desire the business to be continued *in his name by his executors*, as it might result in financial disaster instead of a benefit to those interested.

His reputation, or that of his distillery, for making good whisky had been established, and the trade-mark placed upon the barrels of whisky made from the distillery after his death, although of an inferior quality, could not have affected the whisky, or its reputation, made and

McBrayer, Ex'or, v. McBrayer, Ex'trix.

sold by the testator in his lifetime, and, therefore, it was not to save the reputation of his distillery or the whisky (as was argued by counsel) that this prohibition of the use of his name was intended. What the testator may have said after or before the making of his will can not be looked to in its construction. In a case like this the will must speak for itself, and no intent inconsistent with the language used, or in conflict with a rational construction of the will, should be adopted.

It required a large expenditure of means to keep the distillery in successful operation. Many risks had to be assumed by his executors during the period they were required to make whisky. There was no direction, by implication or otherwise, by which the executors were required to convert the distillery into another and different manufactory, or any devise to the effect that the trademark or brand should never be used by his grandchildren or their vendors. What did the testator then mean when saying that after the expiration of the three years "*I desire that my name be entirely stricken from the business*"? What business? The business of making whisky by my executors. His wish was that no greater risks should be assumed by his estate or liabilities incurred for which his estate could be responsible after that time.

Conceding, however, for the purposes of this case and in the discussion of the questions involved, that there is an ambiguous meaning in the language used, that it is susceptible of two constructions, one of which will destroy, to a great extent, the value of the property, and another leaving it in the condition it is found at the expiration of the three years, relieved of all the burdens placed upon it by the testator, it will be seen at once the chancellor will

adopt that construction most favorable to the appellants when it can work no injury to the dead, and is entirely consistent with the intention of the testator gathered from his own language when making the devise.

A man of the intelligence and business capacity possessed by the testator, if he had desired to stop the making of whisky in this distillery, would have said so, but, on the contrary, he devises it to his descendants for the very purpose for which he had used it so many years, and if his wish was to destroy his trade-mark so as to lessen the value of what he had devised, or to sustain his reputation for making good whisky, he would have said so in express terms and by language that could have no dubious meaning. He could have had no such religious or conscientious scruples as would have induced him to say that his name should no longer be connected in any manner with the distillery, because he had placed that which produced the evil in the hands of infants innocent of wrong, but for the very purpose of producing that out of which his entire fortune had been made. He was, doubtless, an honest, conscientious man, as counsel maintain, and if so, he would not have enabled, by his last will, his grandchildren to engage in a business that he had abandoned by reason of the evil resulting from it.

It is plain to us that when the testator wanted his name entirely stricken from the business, his meaning was the business of making whisky in his name by his executors for his estate, and that the value of the trade-mark, or the right of property in it, devised to his grandchildren was not the subject of consideration by him when making the devise. With this construction the personal and business integrity of the testator is made manifest and carries into

 John C. Lewis Co. v. Scott.

execution an intent that comports with the character of the man, the language of the will, and sustained by every rational view of the question presented.

The thirteenth clause of the will authorizing and requiring the views of his wife to be adopted as to the method of managing, settling up and disposing of the estate when the executors differ, will not authorize a construction of the will as given by the widow to be followed so as to destroy the devise or change the intent of the testator.

The judgment of the chancellor below is reversed, and the case remanded, with directions to enter a judgment to the effect that the brand or trade-mark, "W. H. McBrayer Cedar Brook Distillery," passed under the devise to the grandchildren of the testator and is their property.

95	484
114	739
95	484
1133	625

 CASE 84—PETITION ORDINARY—APRIL 28.

John C. Lewis Co. v. Scott.

APPEAL FROM LOUISVILLE LAW AND EQUITY COURT.

MASTER AND SERVANT—WRONGFUL DISCHARGE.—Where an employe under contract to perform services for a stipulated time is wrongfully discharged by his employer before the expiration of his term of service, the measure of damages is the contract price less what the discharged employe has earned or might by reasonable diligence have earned. And as the law does not imply loss of time and employment by reason of the discharge, the discharged employe must, in order to recover more than nominal damages, allege and prove that he has, after reasonable effort, failed to find employment, or, finding it, is not paid as much as he would have received for like services under the contract. And if the discharged employe sues before the expiration of the contemplated term of service, he takes the risk of not being able to fix

John C. Lewis Co. v. Scott.

the damage or loss with certainty; he must lay the basis as best he can upon which the jury may assess the damages, and while it will be only an approximation, it is the most that can be required:

In this case, as the plaintiff did not allege that she had continued out of employment, or had sought work, she was not entitled to more than nominal damages.

W. W. THUM AND WILLSON & THUM FOR APPELLANT.

1. To entitle an employe who has been wrongfully discharged to recover, he must allege not only a breach of the contract but also that he made reasonable efforts to procure other like employment, and failed either in the effort or in the amount of compensation, and that he did not otherwise have employment of any kind, or, if so, he must allege the wages earned, and failing to make such allegations he can recover only nominal damages. (*Duffley v. Brennan*, 10 Ky. Law Rep., 637; *Whittaker v. Sandifer*, 1 Duv., 262; *Frazier v. Clark*, 88 Ky., 260; *Wood v. Morgan*, 6 Bush, 607; *Chamberlain v. McAllister*, 6 Dana, 855; *Jewell v. Blandford*, 7 Dana, 473; *Wilson v. Barnes*, 13 B. M., 381; *Hayworth Co. v. Haldeman*, 14 Ky. Law Rep., 202; 2 *Sutherland on Damages*, 474; 6 Dana, 353; *Miles v. Miller*, 12 Bush, 138.)
2. When it appears that the plaintiff did obtain work after her discharge, it then devolves upon her to show what she got, otherwise there is no basis upon which actual damages can be ascertained, and as special damages must be accurately measured, the verdict and judgment can not be sustained. (*Duffley v. Brennan*, 10 Ky. Law Rep., 637; *Whittaker v. Sandifer*, 1 Duv., 262; *Frazier v. Clark*, 88 Ky., 260; *Hearn v. Garrett*, 49 Texas, 219; *Hunt v. Crane*, 33 Miss., 670.)

SAMUEL B. KIRBY FOR APPELLEE.

Brief withdrawn.

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

If an employe is under a contract to perform service for a stipulated time and is wrongfully discharged by his employer before the expiration of his term of service, he may recover his actual damages. He may recover nominal damages on the mere allegation of the breach of contract, but it does not follow that because he is wrongfully discharged and the contract therefore broken, he has been actually damaged to the extent of the sum he would have received under the contract. By immediately obtaining more remunerative employment, he may have been in

John C. Lewis Co. v. Scott.

fact profited by the discharge. Therefore, in bringing his action, if he has been specially damaged, that is, fail to find employment, or, finding it, is not paid as much as he would have received for like service under the contract, then he must say so, or be content with nominal damages only.

This principle was thus illustrated in *Frazier v. Clark, &c.*, 88 Ky., 266: "If A, with his machine, undertakes to thresh the grain of B on a named day, at a fixed price per bushel, and B declines to permit the work to be done, it does not follow as a matter of law that A can recover the contract price, less the costs of his hands, as damages. If he should employ his machine in threshing a like quantity of grain for others on the same day, with no loss of time or inconvenience by reason of B's conduct, the injury is nominal only." And because there was no allegation in the petition of any extra expense, loss of time or any special injury, that case was reversed in order that the plaintiff, if he desired, might amend his petition in that respect.

In this case, the appellee brought her action against the appellant, alleging that she had been employed by the latter for one year, at a salary of \$3,500, in the capacity of modiste and dressmaker, and after serving one month without fault on her part, she had been wrongfully discharged, thrown out of employment, left without money among strangers, and greatly injured in reputation as a dressmaker, etc. Her discharge was admitted by the answer, but the cause of it was attributed to the plaintiff's incompetency. Upon the trial, occurring some seven months after her discharge, she was awarded \$2,200, the verdict of the jury seeming to be for the amount due

John C. Lewis Co. v. Scott.

under the contract up to that time. And although she had not alleged that she had continued out of employment or had sought work, she was allowed to testify to that effect over the objection of the appellant. Upon the principles announced this was clearly erroneous. If it was to be a part of her damages that she remained out of employment after seeking it, it was incumbent on her to allege the fact, and if because she brought her suit before the expiration of the contemplated term of service, she could not fix the damage or loss with certainty, this was a burden she voluntarily assumed by bringing the suit when she did. She must lay the basis as best she may upon which the jury may assess her damages. It would be an approximation, but is permissible, and is the most that could be required of her and the best she could do unless she waited until the year was out. We are aware that some of the text writers and the courts of some of the other States lay down a different rule. Thus, in *Howard v. Daly*, 61 N. Y., 362, it is said: "*Prima facie*, the plaintiff is damaged to the extent of the amount stipulated to be paid. The burden of proof is on the defendant to show either that the plaintiff has found employment elsewhere, or that other similar employment has been offered and declined, or at least that such employment might have been found. I do not think that the plaintiff is bound to show affirmatively, as a part of her case, that such employment was sought for and could not be found."

Thus the measure of damages is the same everywhere. It is the contract price less what the discharged employe has earned or might by reasonable diligence have earned. But the rule in this State is that the burden is on the plaintiff to make out his whole case. The law does not

John C. Lewis Co. v. Scott.

imply loss of time and employment by reason of the discharge. These things are not necessarily the result of the discharge, and are in the nature of special damages and must be pleaded. It does not follow necessarily that because the servant is thrown out of employment by his wrongful discharge he will remain idle for the term he had intended to work. The law implies no such result, but if such be the result without his fault and in spite of reasonable effort to find work, he may recover the whole contract price, provided he alleges and proves that state of case. Such has been the rule in this State since the case of *Whittaker v. Sandifer*, 1 Duv., 262. See also *Chamberlain v. McAllister, &c.*, 6 Dana, 358; *Frazier v. Clark, &c.*, *supra*. Mr. Sutherland in his work on Damages recognizes this to be the rule in Kentucky (2d vol., p. 474), saying: "In some States it is held that the plaintiff must show the amount of his loss by proving his diligence to get other employment, and what he has been able to realize." He refers to cases from Mississippi, Texas, Arkansas, Kentucky and Virginia. The case of *Dufficy v. Brennan* (Sup. Ct., Dec., 1888), 10 Ky. Law Rep., 637, is also directly in point.

We perceive no other error in the introduction of testimony or in its exclusion. The instructions are correct. On the return of the case the plaintiff, if she desires, may amend her petition, as in its present form it does not support a judgment for other than nominal damages.

For the reasons indicated the judgment is reversed.

Nashville, &c., Railroad Company v. Carrico.

CASE 85—PETITION ORDINARY—MAY 3.

Nashville, &c., Railroad Company v. Carrico.

APPEAL FROM MARION CIRCUIT COURT.

1. **PLEADING—TRAVERSE.**—In an action against a common carrier to recover damages for injury to live stock while being transported by it, a denial by defendant of knowledge or information sufficient to form a belief as to whether it injured the stock is not good.
2. **VENUE OF ACTION AGAINST COMMON CARRIER.**—Where a contract made with a railroad company for the shipment of live stock provided for the transportation of the stock over the line of another company, which was to receive its proportion of the price of transportation, the former company must be regarded as having made the contract as the latter's agent, and an action against the latter company to recover damages for injury to the stock while being transported over its road may be brought in the county in which the contract was made by the former company.
3. **SERVICE OF PROCESS** in such an action was properly had upon the defendant's agent nearest the county seat of the county in which suit was brought, although in another county.

HUGH P. COOPER FOR APPELLANT.

1. The trial court did not have jurisdiction of appellant. (Civil Code, secs. 58, 73, 78, 80, 419.)
2. It was error to take from the jury, by peremptory instruction, the issues of fact.
3. In the absence of allegation and proof of legislative authority the appellant could not lease, or be made liable for injuries occurring on the Western & Atlantic Railway.

RIVES & SPALDING FOR APPELLEE.

1. As the contract of transportation was made in Marion County, suit on the contract was properly brought in that county. (Civil Code, sec. 73.)
2. The service of process was sufficient to bring appellant into court. (Civil Code, sec. 51, subsec. 4; Adams Express Co. v. Crenshaw, 78 Ky., 136.)

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

This action was brought by appellee, Carrico, against

95	489
113	533
115	51

95	489
127	660

95	489
129	454

Nashville, &c., Railroad Company v. Carrico.

the Louisville & Nashville Railroad Company and appellant, Nashville, Chattanooga & St. Louis Railroad Company, both being common carriers, to recover damages for injury to a car load of mules shipped at Lebanon, Marion County, Kentucky, under contract for safe delivery at Atlanta, Georgia.

The contract was made by appellee with the first-named company which undertook to transport the animals to Nashville, Tennessee, to be carried from there by the latter company, which appears to either own or have in its possession and control a continuous line of railway to Atlanta. It is in substance alleged that the Nashville, Chattanooga & St. Louis Company agreed to transport appellant's mules from Nashville to Atlanta, receiving therefor a proportion of the whole amount fixed in the contract with Louisville & Nashville Company for the whole distance, but by negligence of its agents in operating the train on which the animals were placed, they were greatly injured.

But that company did not, as required by the Civil Code in such case, deny appellee's mules were, while being transported on its road, injured as alleged in the petition, but simply stated it did not have sufficient information to form a belief on the subject. Subsection 7, section 13, authorizes such traverse by a party only when facts alleged in an adverse pleading are not presumptively within his knowledge. But when, as here, it is the duty of a railroad company, by its managing officers, to know whether its trains have been operated properly or in such manner as to destroy life and property, a mere denial of sufficient knowledge or information to form a belief concerning the fact, does not amount to a traverse. The

Nashville, &c., Railroad Company v. Carrico.

lower court therefore properly instructed the jury to find for the plaintiff, appellee, if it had jurisdiction to try the case at all.

The action having been dismissed as to the Louisville & Nashville Company, the question arises whether the Marion Circuit Court acquired jurisdiction of the Nashville, Chattanooga & St. Louis Company by simple service of process on its chief officer or agent in the county of Fulton, in which it operates one of its railroads. And that question depends upon construction of section 73, Civil Code, as follows: "An action against a common carrier, whether a corporation or not, upon a contract to carry property, must be brought in the county in which the defendant, or either of several defendants, resides; *or in which the contract is made*, or in which the carrier agrees to deliver the property."

Appellant did not reside in the county of Marion, nor were the mules agreed to be delivered there. But it seems to us the contract in this case, having been made in Marion County by the Louisville & Nashville Railroad Company, acting as appellant's agent, must, in meaning of that section, be regarded as made there by appellant itself. And, consequently, the Marion Circuit Court had jurisdiction of the person of appellant if the summons was served according to subsection 4, section 51, which provides that in an action brought pursuant to section 73, as was done in this case, "if a defendant operate a railroad it may be served upon defendant's passenger or freight agent at, or nearest to, the county seat of the county in which the action is brought."

The record, in our opinion, shows existence of each of

Bush, &c., v. Robinson.

the conditions of jurisdiction of the Marion Circuit Court and validity of a service of summons prescribed by the Civil Code. And as there is no question made of the correctness of the judgment upon any other ground, it must be affirmed.

CASE 86—PETITION EQUITY—MAY 3.

Bush, &c., v. Robinson.

APPEAL FROM CLARK CIRCUIT COURT.

1. **CORPORATIONS — INDIVIDUAL LIABILITY OF STOCKHOLDERS.** — The stockholders of a corporation organized under chapter 56 of the General Statutes are personally liable for the debts of the corporation to the amount of the unpaid installments on the stock subscribed by them; but a creditor of the corporation may, by special contract, waive his right to look to the individual stockholders, and oral testimony is competent to show such a contract.
2. **SAME.** — Where the capital stock of a corporation was to be represented by land to be conveyed to the corporation, and it was provided in the articles of incorporation that upon the land being conveyed to the corporation the stockholders should be entitled to have issued to them as paid-up the full amount of stock subscribed, this provision might, as between the stockholders and the corporation, be valid, but it is not so as to creditors, and but for a special contract with the vendor of the land exempting the stockholders from personal liability they would, to the extent of the unpaid installments due upon their subscriptions, be liable to the vendor for the unpaid purchase price of the land.

GRUBBS & MORANCY FOR APPELLANTS.

1. Where stock is paid for at less than par under a fair understanding between the corporation and the stockholders, the contract is valid and there is no debt. (*Scoville v. Thayer*, 105 U. S., 143.)
2. There being no debt the stockholders (appellants) can not be sued for an assessment until the assets of the corporation have been exhausted. And the proof in this case showing that no effort has been made to exhaust the assets of the corporation, this action is premature. (*Scoville v. Thayer*, 105 U. S., 143; *Jones' Assignee v. Johnson*, 10 Bush, 649; *Haldeman v. Ainslie*, 82 Ky., 395; *Thompson v. Reno*, 3 Am.

Bush, &c., v. Robinson.

- St. Rep., 814; Bell's Appeal, 115 Pa. St., 88 (2 Am. St. Rep., 532); Cook on Stock and Stockholders, sec. 200; Morawetz on Corporations, vol. 2, sec. 820.)
3. The capital stock having been paid for in land at a fair valuation, and this fact being known to the appellee, he can not now hold the appellants to an assessment. (Bank of Fort Madison v. Allen, 129 U. S., 373; Morawetz, vol. 2, secs. 829 and 871; Cook on Stock and Stockholders, secs. 44, 45, 46; Coit v. North Carolina Gold Amalgamating Co., 119 U. S., 343; Haldeman v. Ainslie, 82 Ky., 395.)
 4. The contract to look to the lands alone and not to the incorporators or stockholders was a binding contract between the parties. (Cook on Stock and Stockholders, sec. 216; Morawetz, sec. 871; Thompson v. Reno Savings Bank, 3 Am. St. Rep., 814; Brashear v. Forbes, 36 Md., 164; Brown v. Eastern S. Co., 134 Mass., 59.)
 5. The petition did not contain allegations sufficient to bring this case within section 14 of chapter 56, General Statutes.

WM. LINDSAY AND BECKNER & JOUETT OF COUNSEL ON SAME SIDE.

J. M. BENTON FOR APPELLEE.

1. The unpaid installments on subscriptions to stock are liable for the debts of a corporation; and the stockholders can not by a private arrangement between each other, or between them and the corporation, relieve themselves from liability to the full extent of the capital stock. (2 Morawetz on Private Corporations, sec. 824; Hatch v. Dana, 101 U. S., 205, 215; 2 Beach on Private Corporations, sec. 561; Scoville v. Thayer, 105 U. S., 154; Note to Thompson v. Reno Savings Bank, 3 Am. St. Rep., 819.)
2. Appellee can not be charged with knowledge of or prejudiced by the private arrangement disclosed for the first time when the answers were filed. Such an arrangement is void and can not be relied upon for any purpose. (Union Mutual Life Ins. Co. v. Frear Stone M'f'g Co., 37 Am. Rep., 129.)
3. Bush and Coleman can not set off against their liability the amount of the corporation's indebtedness to them. (2 Beach, sec. 727; 2 Morawetz, sec. 861; Reno Savings Bank v. Thompson, 3 Am. St. Rep., 826; Thompson's Liability of Stockholders, sec. 882.)
4. The statute gives the creditors of a corporation a new remedy and enables them to reach the assets of the corporation remaining in the hands of the subscribers to its stock in an original and direct proceeding. (Gen. Stats., chap. 56, sec. 14; Marine and River Phosphate Mining and Manufacturing Co., &c., v. Bradley, 105 U. S., 175-183; Rev. Stats. of South Carolina, chap. 64, sec. 36; Civil Code of California, sec. 322; Barnes v. Babcock, 29 Am. St. Rep., 158; Revised Statutes of Missouri (1879), sec. 736; Tatum v. Rosenthal, 29 Am. St. Rep.,

Bush, &c., v. Robinson.

.97; Hatch v. Dana, 101 U. S., 205-215; Civil Code of Ky., sec. 92, subsec. 4.)

5. While it is competent for a person contracting with a corporation to agree that he will not hold the stockholders liable in their individual capacities, even to the extent of unpaid subscriptions of stock, yet such a waiver must be clearly shown, which was not done in this case.

J. F. WINN ON SAME SIDE IN PETITION FOR REHEARING.

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

March 17, 1890, R. T. Coleman and H. W. Clark associated and became incorporated under chapter 56, General Statutes; name of the corporation being "Grand Boulevard Residence Company," and its principal place of business, Louisville. The articles of incorporation contain the following clauses: "1. That the general nature of business to be transacted is to buy, sell and deal in lands in Kentucky, to lay off same into boulevards, lots, streets, etc. 2. The amount of capital stock authorized is \$30,000, to be issued in shares of \$100 each, which is fully paid up, represented by the conveyance of about forty-three acres of land, near Winchester, Clark County, and when said land is so conveyed to, and accepted by, the corporation, said amount of stock shall be issued fully paid up and non-assessable for any purpose. 3. The private property of the stockholders, directors and incorporators shall be exempt from corporate debts."

On the same day a meeting was held for the purpose of organizing the company, when the capital stock of \$30,000 was subscribed for, and directed to be issued fully paid up and non-assessable, upon payment at rate of \$15 per share by the subscribers, who were R. T. Coleman, S. S. Bush, G. T. Berry and W. E. Bradley. The next day, March 18th, John V. Robinson conveyed to "Boulevard Residence Company" about forty-three acres of land, the

same mentioned in the articles of incorporation, at the price of \$18,360, of which \$4,590 was then paid, and for residue, notes, secured by lien on the land, were executed by the company through its president, S. S. Bush.

This action was brought by Robinson in Clark Circuit Court against the company and the stockholders named, to recover amount of said notes. And personal judgment therefor was rendered not only against the company, that made no defense, but against Coleman and Bush, each to extent of \$4,590, and against Berry and Bradley, each to the extent of \$2,295.

Several grounds of defense to the action were relied upon in the lower court, as they are here, but we need consider only that pleaded in paragraph six of the joint answer, as follows: "There was an express contract and understanding with said Robinson that no personal liability was to attach to any officer or stockholder of the company by reason of said notes, or by reason of any indebtedness that might be due to the company from other sources, but that the contract was with the distinct understanding the only claim plaintiff Robinson had, was against the corporation and said tract of land, and not against any individual stockholder thereof."

It appears that prior to organization of the company, S. S. Bush, being at Winchester, had purchased, or obtained from Robinson, an option on twenty acres for Coleman, Bush & Co., a firm engaged in buying and selling lands, which was by telegram enlarged to forty-three acres. But when he went back to consummate the trade, the deed was drawn so as to make the company vendee, and also sole obligor of the notes for deferred payments. Besides Bush, two witnesses, having no interest in the action,

Bush, &c., v. Robinson.

state that when the deed was presented to Robinson, and the notes signed by the company, by Bush, its president, and tendered, it was fully and clearly explained to and understood by him, that the stockholders had paid of their subscriptions to the capital stock of the company, money enough to make the cash payment on the land, and did not intend to risk more, but that he was to look only to the corporation and the land, its only property or means, for payment of residue of purchase money, which he agreed to do.

The land was, as Robinson manifestly knew, purchased for purpose of mere speculation, at a time when what is called "a real estate boom" prevailed at Winchester and vicinity, and at a price three times as great as, according to evidence in this case, it will now bring, or probably would have brought very soon after the transaction. And it is an entirely reasonable belief Robinson was willing and did agree to waive recourse on the stockholders, rather than forego a sale whereby he would, without risk, obtain double the actual value of his land; and in our opinion, notwithstanding he testifies to the contrary, the evidence clearly supports the allegation of the answer.

But, although the provision of articles of incorporation by which the stockholders were, upon the land being conveyed to the corporation, entitled to have issued to them as paid up the full amount of stock subscribed, might, as between them and it, be valid, it was not so as to creditors. For section 14, of chapter 56, General Statutes, in terms provides that stockholders of a corporation shall not be exempt from individual liability to the amount of the unpaid installments on the stock subscribed by them, or transferred by them for the purpose of defrauding cred-

itors; and an execution against the company may to that extent be levied upon the private property of such individual. And having actually paid but \$15 upon each share of stock of the face value of \$100, the defendants, now appellants, are unquestionably liable for balance of purchase price of the land to the extent of the unpaid installments, unless released by the alleged agreement of appellee Robinson, and whether they were, is the main question in this case.

In Cook on Stock and Stockholders, section 216, it is said: "A corporate creditor may, by express contract made when the debt was incurred, waive his right to collect from the stockholder debts which the corporation fails to pay." And in Morawetz on Corporations, section 871, is this language: "A statutory provision declaring that the shareholders in a corporation shall be individually liable to creditors, would not prevent the execution of contracts into which this liability does not enter. If a person contracting with the corporation should expressly agree to accept the obligation of the corporation without the special liability of its shareholders, he would not be able to charge the latter. Such provision is solely for benefit of those dealing with the corporation, and may be waived by them." In support of the doctrine thus stated, the following cases are cited: *Brown v. Eastern Slate Co.*, 134 Mass., 590; *Basshor v. Forbes*, 36 Md., 134; *French v. Teschemaker*, 24 Cal., 518; *Robinson v. Bidwell*, 22 Cal., 379.

In *Brown v. Eastern Slate Co.*, the plaintiff accepted promissory notes of the corporation in payment of property sold to the company under a written contract. At the same time he orally agreed with the directors that the

Bush, &c., v. Robinson.

shareholders should incur no personal liabilities for the claim. And the court held the oral agreement was binding.

In *Basshor v. Forbes*, a steam engine was purchased by a corporation, for which it gave notes, secured by mortgage on certain lands. And the action was brought on the notes against a stockholder alleged to be liable, because the whole amount of the capital stock of the company had not been paid in, and he was a stockholder thereof to an amount greater than the demand sued on. But upon proof of an oral agreement the vendor was to look to the mortgage and not to stockholders, he was held not entitled to recover.

In both cases cited, the question of competency of oral testimony to prove such collateral agreement was considered, and it was held that as it did not contradict or vary the written contract, it was competent.

In our opinion the effect of the agreement by Robinson to look to the company and to the lien on the land and not to the stockholders for payment of the notes sued on, was to exempt the latter from liability.

The judgment is therefore reversed, and cause remanded for dismissal of the action against appellants.

Bent & Co. v. Barnett, &c.

CASE 87—PETITION EQUITY—MAY 3.

Bent & Co. v. Barnett, &c.

APPEAL FROM LOUISVILLE LAW AND EQUITY COURT.

IMPROVEMENT BY GUARDIAN OF WARD'S REAL ESTATE—RIGHT OF CONTRACTOR TO SUBJECT INCREASE IN RENTS.—Where the property of wards had been enhanced in value by improvements erected under a contract made by the guardian in good faith for the benefit of the wards, and it was held upon a former appeal that, although the guardian had no power to make the contract, the contractors might subject the rents of the property to the payment of the actual cost of the improvements to the extent that they had been increased by reason of the improvements, the fact that it now appears that by reason of the decline in business or from other causes there has been such a falling off in the rents that they are very little in excess of what they were prior to the making of the improvements, does not entitle the contractors to apportion the rent so as to throw upon the infants any part of the burden of the loss. The contractors can subject only the amount in excess of that which the property yielded before the improvements were made.

STONE & SUDDUTH FOR APPELLANTS.

1. Under the opinion of this court on the former appeal holding that the claim of Bent & Co. should be paid out of the enhanced rental value of the property by reason of the improvements (90 Ky., 610), the time at which the enhanced rental value should be estimated and determined is immediately following the completion of the improvements, and not, as counsel for Barnett's Heirs contend, as of this date after the lapse of seventeen years from the time said building was finished.
2. The proof is clear and satisfactory that all the rental value of the property after it was improved was *enhanced rental value*, resulting directly and wholly from the work and labor and materials furnished in the new building.

THOMAS F. HARGIS OF COUNSEL ON SAME SIDE.**JOHN S. JACKMAN FOR APPELLEES.**

1. The infant wards can only be charged upon the idea that they received a benefit, and the proof showing the benefit in such cases should be clear and positive, which is certainly lacking in the present case. (Bent & Co. v. Barnett, 90 Ky., 600; Hobbs v. Harlan, 10 Lea (Tenn.), 280.)
2. The order allowing appellees to withdraw the interest until appellants

Bent & Co. v. Barnett, &c.

established their claim was not a final order. (Helm v. Short, 7 Bush. 628; Neal v. Thomasson, 7 Ky. Law Rep., 444; Lewis v. Melvin, 6 Ky. Law Rep., 639.)

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

This case has been heretofore in this court, and the judgment reversed, that the appellants might recover the enhanced rental value of the property by reason of the large expenditure made by them on appellees' property, the pleadings conducing to show that the increase in rental was almost double that of the old building.

The opinion was not based on the idea that the guardian had the power to make contracts that would involve his wards in debt or subject their estate to the liens of the builders, but for the reason that the guardian and the appellants were acting in good faith, and to give to the wards the proceeds of their labor and the material furnished without any consideration whatever, would be inequitable and unjust, when the rights of the infants, by giving the enhanced value of the rents, could in no wise be prejudiced.

They had improved the building under these contracts with the guardian at a cost of near \$22,000, when it now appears from the testimony that the property has been sold, the ground upon which the building stands being valued at \$550 or \$500 per front foot, being twenty-five feet, and the improvements at less than \$10,000.

It is evident from the facts before us that an expenditure of three or four thousand dollars would have been sufficient to have remodeled the structure or to have placed it in such condition as its rental would have been equal to the improvement, costing over \$20,000. Those connected with the Fidelity Trust and Safety Vault Company, and

* 90 Ky., 600.

having charge of this property, state that since August, 1890, after deducting the yearly necessary expenses on the property, taxes, insurance, etc., there was a net rental of \$1,145 per year, a part only of which went to these appellees.

The building after its improvement never exceeded in rental value, \$2,000. From the year 1876 to the date of sale, a period of fourteen or fifteen years, the wards, who are now adults, did not receive in the way of net rental a sum exceeding five or six hundred dollars per annum. The old building at the time it was vacated was renting for \$2,500 per annum, and it may well be argued from this proof that the old building would have rented for as much as the new building, but whether so or not is immaterial. It may be conceded that the decline in business, or its transit from that part of the city to more favorable locations, has caused this falling off in the rent, still these owners of the property are not in law or equity required to share their burden of the loss.

This case was placed distinctly upon the ground that by giving to the appellants the enhanced value of the rents, it would leave the rights of the appellees undisturbed, giving to them the rent they had been receiving, and placing them in the possession of a new building. We are now asked to apportion this small rental between these parties, when the appellants have no right whatever to be heard, except such as arises from a plain equity that would give them a small pittance for their labor, and injures no one else. The facts when made to appear present no such case, and the chancellor acted properly in refusing to encumber the property of the appellees and in dismissing the claim of the appellants. The judgments below are affirmed.

Parkland Hills Blue Lick Water Company v. Hawkins & Co.

CASE 88—PETITION EQUITY—MAY 3.

Parkland Hills Blue Lick Water Company
v. Hawkins & Co.

APPEAL FROM JEFFERSON CIRCUIT COURT, LAW AND EQUITY DIVISION.

TRADE-MARK.—The lessees of Blue Lick Springs, who handle the water of those springs as an article of commerce, and who have for many years used the name "Blue Lick Water" as their trade-mark, are entitled to the exclusive use of that name as a trade-mark, and upon their petition the defendants, who handle a mineral water obtained from an artesian well in a distant part of the State, are enjoined from using the words "Blue Lick" as a part of their trade-mark.

O'NEAL, PHELPS, PRYOR & SELIGMAN FOR APPELLANT.

(No brief in record.)

JOHN W. BARR, JR., FOR APPELLEES.

1. Appellees have a right to be protected in the use of the words "Blue Lick" as a brand or trade-mark in the prosecution of their business. (Newman v. Alvord, 49 Barbour, 588; McAndreas v. Bassett, 10 Jurist (N. S.); Canal Co. v. Clarke, 15 Wall., 311; Congress Spring Co. v. High Rock Congress Spring Co., 45 N. Y., 291; Dunbar v. Glenn, 42 Wis., 118; Metcalf v. Brand, 86 Ky., 364.)
2. To constitute an infringement of the right it is not necessary that the imitation should be an exact counterpart of the original. (Bradley v. Norton, 33 Conn., 165.)

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

The appellees are the lessees of the Lower Blue Lick Springs in Nicholas County, and since 1888 have been engaged in handling "Blue Lick" water, a product of those springs, as an article of commerce.

The appellant is a corporation of recent creation which has put on the market a water denominated "Parkland Hills Blue Lick Water," the words "Blue Lick" being made the most prominent part of the various advertising mediums adopted. This water is obtained from an

Parkland Hills Blue Lick Water Company v. Hawkins & Co.

artesian well near Louisville, Ky. The appellees brought this action to restrain the appellant from using the words "Blue Lick" in connection with the name of its water, and the relief asked having been granted by the court below, the corporation has appealed.

The record discloses that the water from the springs, now under the control of the appellees, has been famous under the appellation of "Blue Lick Water" for more than a century. It has been received with favor throughout the United States and in some foreign countries. It is said to be incomparable as an alterative and aperient, and highly valuable as a nervous stimulant, diaphoretic and diuretic.

The Blue Licks, the upper and the lower, have been known since the early settlement of the State, indeed, years before the formation of the State. It was at the lower springs that, in 1782, the memorable and sanguinary battle occurred between the whites and the Indians, making the spot historically renowned. Buffalo and other wild animals had well-beaten "traces" to and from this spring which they frequented to lick the deposits from the water, hence the first name was "The Licks." The commercial value of the water was early recognized, and years ago the predecessors of the appellees adopted the name "Blue Lick Water" as their trade-mark.

The trade-mark of the appellees consists of a circular inscription of the words, "The Celebrated Blue Lick Water," in large letters at the top of the circle, and the words "From E. C. Hawkins & Co., sole proprietors, Blue Lick Springs, Ky.," in smaller letters at the bottom of the circle. In the center is the erect figure of a Kentucky pioneer with his rifle and dog, and on either side

Parkland Hills Blue Lick Water Company v. Hawkins & Co.

of the hunter are the words and figures, "Daniel Boone, 1782, trade-mark."

The question before us does not affect the owners of the upper springs, the sole question being whether the plaintiffs are to be protected from the corporation engaged in selling the artesian water as "Blue Lick Water." Of this we entertain no doubt. A trade-mark may be a name adopted and used by a merchant or dealer in order to designate the goods that he sells and distinguish them from those sold by another, to the end that they may be known in the market as his, and thus enable him to secure such profits as result from the celebrity of his wares or his reputation for superior skill, industry or enterprise in handling the article put on the market. Any name may be so used that he may deem appropriate as designating the true origin or ownership of the article to which it is affixed, though he may not appropriate a name indicative of the quality of his goods which others may employ with equal truth for the same purpose.

There is no conceivable reason why the name of a place may not be selected as a trade-mark, or the natural product of a spring be the subject of the protection afforded by it. Thus, in *Newman, &c., v. Alvord, &c.*, 51 N. Y., 189, the plaintiffs were protected in the use of the word "Akron," the name of the village where they made cement, against those who were making "Akron" cement at Syracuse. So, in *Dunbar v. Glenn*, 42 Wis., 118, the owner of the mineral spring "Bethesda" was given the exclusive use of that name as a trade-mark indicating the origin or ownership of the waters therefrom, and it was said the law in relation to trade-mark applied whether the vendible commodity be natural or artificial, for other-

Parkland Hills Blue Lick Water Company v. Hawkins & Co.

wise the purchaser would have imposed upon him an article that he never meant to buy, and the owner would be robbed of the fruits of the reputation that he has successfully labored to earn. So, also, in *Congress & Empire Spring Co. v. High Rock Congress Spring Co.*, 45 N. Y., 291, it was held that the owner of a peculiar product of nature, such as mineral water, will be protected in the exclusive use of a name given to it and employed as a trade-mark. The word "Congress" in the phrases "Congress Water" and "Congress Spring Water" was held to be a legitimate trade-mark.

In the case under consideration the name adopted by the appellees and their predecessors for the water from the Blue Lick Springs indicated the origin and ownership or place of the product, and is one in the exclusive use of which the appellees should be protected. The proof discloses a scheme by which, when the thirsty patron of certain dealers in the city of Louisville called for Blue Lick water, meaning genuine Blue Lick, which was, confessedly, the Nicholas County product, he was to be given water from the artesian well of the appellant. This was no less a fraud on the public than on the appellees. The purchaser has the right to get what he seeks, and the owner is entitled to the profit from the sale of the thing sought.

Judgment affirmed.

Alford v. Wilson, &c.

CASE 89—PETITION EQUITY—MAY 8.

Alford v. Wilson, &c.

APPEAL FROM FAYETTE CIRCUIT COURT.

STATUTE OF FRAUDS—SUFFICIENCY OF MEMORANDUM.—A writing signed by defendants authorizing a firm of real estate brokers to offer plaintiff a named sum for a city lot, specifically described, is equivalent to a written offer by defendants themselves to plaintiff, and the plaintiff having written at the bottom of the instrument his acceptance of the offer, the two writings together constitute a sufficient memorandum to satisfy the requirements of the Statute of Frauds. And the acceptance being unconditional, it is not material that it was never delivered to the defendants or to any one for them.

BRECKINRIDGE & SHELBY FOR APPELLANT.

1. To satisfy the requirements of the Statute of Frauds, it is not necessary that the *contract* itself between the parties be reduced to writing, but it is sufficient if its terms can be ascertained from some *note* or *memorandum* which is authenticated by the signature of the party to be charged. (Lawson on Contracts, sec. 77; 8 Am. & Eng. Ency. of Law, 711; Ellis v. Deadman, 4 Bibb, 467; Kleeman v. Collins, 9 Bush, 467; Drury v. Young, 42 Am. Rep., 343; Browne on Stat. of Frauds, sec. 351.)

Nor is it necessary that both parties shall sign the memorandum, the signature of the one against whom it is to be enforced being all that is required. (Benjamin on Sales, p. 174; 8 Am. & Eng. Ency. of Law, 718; 2 Kent, 510; 1 Sugden on Vendors, chap. 4, sec. 3, subsec. 2; Browne on Stat. of Frauds, secs. 365-6.)

The memorandum need not show that any agreement has actually been made, but a mere offer or proposal, signed by the party making it and accepted, even verbally, by the other, is sufficient. (8 Am. & Eng. Ency. of Law, p. 711, notes 2 and 4; Benjamin on Sales, p. 172; Pollock on Contracts, p. 145.)

2. When the memorandum is evidence of an existing contract previously made by the parties, no "delivery" of it, in the sense in which that word is used in respect of deeds, is necessary, for the writing is not the substantive act or thing itself, as is a deed, but only the means by which the substantive act—the making of the contract—is shown to have been done. (Drury v. Young, 42 Am. Rep., 344; Townsend v. Hargraves, 118 Mass., 325; 8 Am. & Eng. Ency. of Law, 715.)

Newburger v. Adams, 92 Ky., 27, distinguished.

3. Where one executes a writing authorizing another as his agent to

Alford v. Wilson, &c.

make to a third person therein designated an offer for property, such writing, when submitted by the agent to such person and by the latter acted upon, is the direct offer of the maker of the writing.

J. R. MORTON AND THORNTON & KERR FOR APPELLEES.

1. A contract for the purchase of real estate will not be enforced unless it is mutual and binding on both parties. (*Usher's Ex'or v. Flood*, 83 Ky., 552.)
2. The paper accepted by the plaintiff does not constitute a contract enforceable under the Statute of Frauds, because it is not in terms an offer by the defendants to the plaintiff, but is simply an authority to Stedman & Bowman authorizing them to make an offer to the plaintiff.
3. The writings signed by plaintiff purporting to be an acceptance of the offer of defendants should have been delivered to defendants or to someone authorized by them to receive the same, in order to constitute a contract under the statute mutual and binding on both parties. (*Newburger v. Adams*, 92 Ky., 27.)

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

The question on this appeal is the sufficiency of a petition in equity, filed by the appellant for a specific execution of a contract alleged to be evidenced by the following writings:

LEXINGTON, KY., March 2, 1893.

We hereby authorize Stedman & Bowman to offer M. C. Alford thirteen thousand six hundred and fifty dollars (\$13,650.00) for his lot on North Broadway, and fronting one hundred and thirty (130) feet on said Broadway and running back to an alley. Said lot is bounded generally, on the east by Broadway, on the north by Armstrong, on the south by Fayette Park avenue.

The payments on said lot shall be one-third cash, and the balance in two equal payments, due, respectively, in one and two years from date of transfer, notes to bear six per cent interest. A good and sufficient deed to said lot to be furnished upon the payment of the purchase price.

HALLIE WILSON,
JAMES D. WILSON.

Alford v. Wilson, &c.

I hereby accept the above offer.

M. C. ALFORD.

• The averments of the petition are that upon the execution of the foregoing writing by the Wilsons, Stedman & Bowman, who were real estate brokers, made to the appellant the offer authorized by it, and presented the writing to him, and he thereupon accepted the offer, and in evidence of it wrote his acceptance at the bottom of the instrument; and that repeatedly since then he has offered to perform all the conditions of the agreement on his part and to make appellees a good and sufficient deed of general warranty, but they have refused to accept it, etc.

The chancellor held that the two writings did not constitute either a written contract or memorandum of a contract, and therefore the action was not maintainable by reason of our Statute of Frauds. It was conceded, however, that if the writing given to the brokers could be held under the facts presented in the case as being equivalent to a written offer by the Wilsons, then the case for the plaintiff was complete, and a concise, specific contract for the purchase of the land was made out. With great respect for the argument of the chancellor, we think this is precisely what the writing was intended to be, and in fact was—an offer by the Wilsons, through their brokers, to Alford. Even if we admit a discretionary power on the part of the brokers to make or not make the offer, yet they made it—in parol if we so please to consider it—but, yet, in the written terms dictated by the would-be purchasers.

This writing must be regarded as the offer of the Wilsons. Not merely the “equivalent,” but the very offer to be presented to the vendor, and for what must we say

Alford v. Wilson, &c.

it was so offered? Certainly, for acceptance or rejection; and at the moment of its acceptance the minds of the contracting parties met, and the contract was complete. Is it to be supposed that it was thought necessary for these brokers to go around with this instrument, setting forth the boundary of the property and in detail the terms of the proposed purchase, merely as an evidence of their authority as brokers to treat with Alford on the subject of the purchase of his property? We think not. The writing was intended for Alford's acceptance or rejection, as much so as if it had been addressed to him, saying that the signers "hereby offered for the property, through their brokers, Stedman & Bowman, the sum of," etc. And, acting with this end in view and in pursuance of the intention with which the writing was prepared, the brokers did present it to Alford, who, at once, accepted it—his acceptance being likewise in writing.

The two writings thereby and at once became the contract of the parties, enforceable not alone against the Wilsons but against Alford as well. The brokers stood in the shoes of their principals and made not their own offer but that of their principals.

The offer was continuous and bound the principals upon its acceptance, and after that, it was equally binding on Alford. Mutuality of obligation therefore required in the case of *Usher's Ex'or v. Flood*, 83 Ky., 552, is not lacking in this case.

The statute supposed to be fatal to the enforcement of the alleged contract provides that no action shall be brought to charge any person upon any contract for the sale of real estate unless the contract, "or some memorandum or note thereof be in writing and signed by the

Alford v. Wilson, &c.

party to be charged therewith," etc. (Gen. Stats., chap. 22, sec. 1.)

It seems to us that the substantial requirements of the statute have been complied with in this case, and that the writings constitute a memorandum of the contract, signed by the parties to be bound, upon which an action for specific execution can be maintained. It is contended otherwise for the reason that the written acceptance was not delivered to the Wilsons, or any one for them, so far as the petition shows, and this contention is thought to be upheld by the case of *Newburger v. Adams*, 92 Ky., 27. An examination of that case discloses that the offer of the proposed purchaser was not accepted by the vendor. The writing indorsed on the offer was, "I will accept the \$3,200 for the above described property, \$1,000 in cash and the balance in equal payments of one and two years;" and the offer differed materially from this conditional acceptance as to the terms of payment. Under these circumstances, the indorsement of the vendor was a rejection of the offer and a new proposal altogether, which, of course, must have been delivered to the vendee and accepted by him before it could be said that the minds of the contracting parties had met. This phase of the question is aptly discussed in the case of *Drury v. Young*, 58 Md., 546 (s. c., 42 Am. Rep., 343), where it is said: "Now, the statute itself is entirely silent on the question of the delivery of the note or memorandum of the bargain, and its literal requirements are fulfilled by the existence of the note or memorandum of the bargain, signed by the party to be charged thereby. The statute itself deals exclusively with the existence and not with the custody of the paper. If the non-delivery of the

note does not violate the letter of the statute, would it violate its spirit and be liable to any of the mischiefs which the statute was made to prevent? The statute was passed to prevent fraud practiced through the instrumentality of perjury. It was passed to prevent the defendant from suffering loss upon the parol testimony of either a perjured or mistaken witness, speaking of a bargain different from the one in fact made. It made the defendant only liable when a note or memorandum of the bargain, signed by himself, was produced at the trial." The statute under discussion in that case is similar to ours, as are all the statutes on that subject, having been adopted from the English Statute of Frauds, and many English cases are cited to substantiate the point involved. (See *Gibson v. Holland*, L. R. 1 C. P., 1; *Johnson v. Dodgson*, 2 M. & W., 653.)

We think the demurrer should have been overruled, and the judgment dismissing the petition is reversed and cause remanded for proceedings conformable to this opinion.

Hill, &c., v. Cornwall & Bro.'s Assignee, &c.

CASE 90—PETITION EQUITY—MAY 10.

Hill, &c., v. Cornwall & Bro.'s Assignee.

Merchants National Bank v. Same.

Bank of Louisville v. Same.

Farmers & Drovers Bank v. Hill, &c.

APPEALS FROM JEFFERSON CIRCUIT COURT, CHANCERY DIVISION.

1. **PARTNERSHIP REAL ESTATE—DOWER.**—Where a firm, consisting of father and sons, purchased a building for partnership purposes, paying for it with capital furnished by the father, and with the father's consent an interest in the property was conveyed to each of the sons by separate deed, the property, although thus conveyed, is to be regarded as partnership property and treated as personalty for the payment of partnership debts; and therefore the wives of the partners are not entitled to dower as against the claims of partnership creditors.
2. **DEEDS—RESERVATION OF POWER TO REVOKE—ASSIGNMENT FOR CREDITORS.**—Where a father conveyed real estate to another in trust for his daughter, reserving "full power to revoke each or any or some or all of the uses hereby created and to cause them to shift to other person or persons, including himself," the title passed to the grantee, subject to the power reserved by the grantor to change the use; and the grantor having made a general assignment for the benefit of his creditors without revoking the grant or changing the use, the right to do so did not pass to the assignee. Such a power of revocation is not an interest in the property that can be subjected by the grantor's creditors.
3. **RENT.**—Although the property in which an interest was thus conveyed to the daughter was used by the father and his sons in their partnership business, the daughter, having failed for several years to assert any claim for rent, ought not, after the firm has made an assignment for the benefit of creditors, be heard to assert such a claim, it being manifest from the payments made by the father for both the daughter and her husband that no claim for rent was intended to be asserted.
4. **HUSBAND AND WIFE—SEPARATE ESTATE.**—Money obtained by the firm, after it became involved, from the wife of one of the sons through her husband, and always recognized by the firm as the wife's money, and for the greater part of which a note was executed by the firm to the wife, must be regarded as the wife's separate estate, the husband being a member of the firm by which the note was executed; and the father, for the purpose of securing the son's wife and paying

95	512
104	856
95	512
110	218
111	227
95	512
118	914
95	512
117	796
95	512
134	220
136	836
95	512
137	21

Hill, &c., v. Cornwall & Bro.'s Assignee, &c.

other debts of the firm; having sold and conveyed his individual property to the husband, reciting as a part of the consideration the debt due the wife, the property thus conveyed must be regarded as held in trust by the husband for the wife to the extent of the debt due her; and in this action for the settlement of the husband's estate under an assignment for the benefit of his creditors, the wife is entitled, out of the proceeds of the property, to the amount of the debt due her.

5. **WHERE THERE IS AN ASSIGNMENT OF PARTNERSHIP PROPERTY FOR THE BENEFIT OF CREDITORS, AND A SEPARATE ASSIGNMENT BY EACH PARTNER OF HIS INDIVIDUAL PROPERTY,** the rule of distribution as between partnership creditors and individual creditors is the same that it is where there is a joint assignment of partnership assets and individual assets, and if the partnership creditors elect to avail themselves of the equitable rule which gives them priority over the individual creditors as to firm assets, they can not share in the individual assets until the individual creditors have been made equal with them.
6. **USURY.**—In any case where it is plain from the record that a party is seeking to recover usury, the chancellor should refuse to give judgment for the usury, although the plea is not made by the defendant.
7. **SAME.**—Where a note is renewed, although the renewal is signed by others than those originally bound, all usury will be purged from the transaction so long as the original obligor remains liable. And a payment made at the time of the renewal, although made as a payment of usury, will be treated as a payment on the principal.
8. **ASSIGNMENT FOR CREDITORS.**—The assignee, acting upon his own judgment and also upon the advice of a large number of creditors, having continued the operation of the assigned factory in order to work up the material on hand, and also to preserve the business, can not be held liable for any loss sustained, all parties having acted in the best of faith and with a view to advance the interest of creditors.
9. **SAME.**—Where there is an assignment for the benefit of creditors the chancellor has no power, at the instance of a creditor, to decree the sale of property owned jointly by the debtor with another as provided by section 490 of the Civil Code. The legal title being in the assignee, he alone can sue.
10. **ATTORNEY'S FEE.**—As there was a continuous service by counsel for two years, with questions arising of the greatest importance to the assignee and the creditors, and the assets were of the value of \$200,000, the fee of \$8,000 allowed to counsel was not unreasonable and is fully sustained by the testimony.

DAVID W. FARLEIGH FOR SALLY W. HILL AND OTHERS. APPELLANTS IN FIRST APPEAL, AND APPELLEES IN OTHER APPEALS.

1. By the deed from Wm. Cornwall to his sons, as trustees for his daughter, the title passed completely, subject only to be divested by the

Vol. 95—33.

Hill, &c., v. Cornwall & Bro.'s Assignee, &c.

exercise of the reserved power of revocation. (Jones v. Clifton, 101 U. S., 229.)

Bland v. Bland, 90 Ky., 400; Dumesnil v. Dumesnil, 92 Ky., 526, explained.

2. The power of revocation did not pass to the assignee. (18 Am. and Eng. Ency. of Law, 881; Jones v. Clifton, 101 U. S., 229.)
3. There was never any execution of the power by the grantor. (Blagge v. Miles, 1 Story, 426.)
4. So long as the title remained in the daughter unrevoked, she was entitled to the rent.
5. The wives of Wm. Cornwall, Jr., and A. W. Cornwall, are entitled to dower. None of the property was regarded by the partners as firm property, nor had they any intention of making it firm property, but, upon the contrary, they treated it in every way as the property of the individuals. (Flanagan v. Shuck, 82 Ky., 617; Carter v. Flexner, 92 Ky., 400.)

Cornwall v. Cornwall, 6 Bush, 369, is overruled by Carter v. Flexner.

5. The claim of Mrs. Eleanor Cornwall for money loaned by her to the firm of Cornwall & Brother, presents an equity pure and untainted with any manner of suspicion, and the evidence meets every possible technical objection to the claim. (Maraman v. Maraman's Adm'r, 4 Met., 89; Denning v. Williams, 26 Conn., 226; Huber v. Huber, 10 Ohio, 371; Wood v. Warden, 20 Ohio, 518; Gaines' Adm'r v. Poor, 3 Met., 503; Ward v. Crotty, 4 Met., 59; Latimer, &c., v. Glenn, 2 Bush, 535.)

The facts created a resulting trust. Section 19 of art. 1, chap. 63, Gen. Stats., by its own terms does not apply. (Pomeroy's Eq. Jur. (2d ed), sec. 420; Lounsbury v. Purdy, 18 N. Y., 517; Aynesworth, &c., v. Haldeman, &c., 2 Duv., 566; Faris and wife v. Dunn, &c., 7 Bush, 278.)

An assignee for creditors stands precisely in the shoes of his assignor, and any equity may be asserted against him that could be asserted against the assignor. (Bridgeford, &c., v. Barbour, 80 Ky., 534.)

7. The court has no jurisdiction to order a sale of property owned jointly by two or more persons, except in a suit brought by one of the joint owners. (1 Cooley's Blackstone, 198; Civil Code, sec. 490.)

Here the property was owned by the assignee and Mrs. Hill. It could not be sold except at the suit of the assignee. The assignee did not sue for the purpose, therefore the court had no jurisdiction to order the sale.

8. Mrs. Hill, as a creditor, had the right to make the plea of usury. (Lee, &c., v. Fellows, &c., 10 B. M., 118.)

Besides, the usury being apparent on the face of the record, it was the duty of the chancellor, without a plea, to strike it from the claims containing it. (Lucking's Adm'r, v. Gegg, 12 Bush, 300.)

Hill, &c., v. Cornwall & Bro.'s Assignee, &c.

R. W. WOOLLEY AND FAIRLEIGH & STRAUS, OF COUNSEL ON SAME SIDE.

HELM & BRUCE, FOR BANK OF LOUISVILLE.

1. Where property has been bought with partnership funds, for partnership purposes, and devoted to partnership purposes, the holder of the legal title will, *in equity*, be regarded as a trustee for the firm and its creditors. (Galbraith v. Gedge, 16 B. M., 681; Cornwall v. Cornwall, 6 Bush, 869; Bank of Louisville v. Hall & Long, 8 Bush, 672; Parsons on Partnership, p. 363; Spaulding v. Wilson & Muir, 80 Ky., 590; Devine & Michum, 4 B. M.; Lowe & Lowe, 13 Bush; Flanagan v. Shuck, 82 Ky., 617; Carter v. Flexner, 92 Ky., 400.)
2. Although Wm. Cornwall may not have actually conveyed the interest claimed by Mrs. Hill through the instrumentality of the power of appointment reserved in the deed to her, yet, as he has in the most unequivocal way asserted the right to use and dispose of it as he chooses, the chancellor should subject it to the payment of his debts. A conveyance is not the only means of asserting ownership or dominion. (Johnson v. Cushing, 15 N. H., 694; Tobin v. Dixon and wife, 2 Met., 422.)
3. The interest claimed by Mrs. Hill is held in trust by her brothers for the benefit of Wm. Cornwall, the grantor, he having the power to do with it as he chooses, and it is therefore subject to his debts under section 21 of chapter 68 of the General Statutes. (Bland v. Bland, 90 Ky., 400; Bull v. Kentucky National Bank, *Idem*, 452; Dumesnil v. Dumesnil, 92 Ky.)
4. Wm. Cornwall has executed in favor of his creditors the power reserved in the deed to Mrs. Hill, and has conveyed the property to his assignee.
To constitute the execution of a power of appointment, it is not necessary that the instrument by which it is executed should refer to the power. (Terry v. Rodahan, 79 Ga., 278; *s. c.*, 11 Am. St. Rep., 420; Warner v. Connecticut Mut. Life Ins. Co., 109 U. S., 865.)
5. Mrs. Eleanor Cornwall has not made out a case of separate estate, nor has she shown a loan by her to Cornwall & Brother.
While a husband may permit his wife to set apart the proceeds of her general estate to her own separate and exclusive use, yet his intention to do so must be manifested by a distinct act, unequivocal in its nature and inconsistent with the idea that he reserves the right in any possible contingency to assert his claim to such estate. (Penn v. Young, 10 Bush, 628.)
6. Admitting, for the sake of argument, that Mrs. Cornwall did lend this money out of her separate estate to the firm of Cornwall & Brother, yet there is no proof in this record that she has ever surrendered her claim against the firm, or accepted the conveyance from William Cornwall to her husband as satisfaction thereof, unless such acceptance was made after the assignment, when it could not have been done.

Hill, &c., v. Cornwall & Bro.'s Assignee, &c.

7. The chancellor properly refused to allow the Merchants National Bank to make proof of its debt against Cornwall & Brother, and also against Wm. Cornwall. If the creditor takes the benefit of the preference which equity gives him as to the partnership assets, he must consent to let the individual creditors be made equal out of the individual assets; and this is true whether the partnership name is signed with, or without, the addition of the individual name, and whether the partnership name is signed first or the individual name first. (Northern Bank of Kentucky v. Keizer, 2 Duv., 169; Fayette National Bank v. Kenny, 79 Ky., 133.)
8. While the court would not give a judgment for any usury contained in the paper sued on, yet usury that has heretofore *been paid* can not be construed as a payment on the principal, but merely gives to the debtor a cause of action which he, by his personal election, might assert in the nature of a set-off or counter-claim, but which he has not done, and which, therefore, the court can not consider; and this position is made doubly strong if the court holds, as the lower court did, that Mrs. Hill, the only party charging usury, is not even a creditor. (Hart v. Hayden, 79 Ky., 346; Smith v. Young, 11 Bush, 393; Estelle v. Rodes, 1 B. M., 314.)
9. If it was proper to eliminate usury the court erred as to Merchants National Bank debt in not eliminating the interest charged on the last renewal. (Sydney v. Mt. Sterling National Bank, 15 Ky. Law Rep., 4.)
10. The assignee should be charged with the loss of \$11,114.16 by the operation of the factory.
11. The judgment allowing assignee's and attorneys' fees should be reversed for excessiveness.
12. The chancellor had jurisdiction to order a sale of the property upon the petition of creditors, the real parties in interest. (Civil Code, secs. 428, 438, 490.)

MUIR, HEYMAN & MUIR FOR LOUISVILLE TRUST COMPANY, ASSIGNEE.

1. The assignee is not liable for the alleged loss incurred in the operation of the factory business.

An assignee for the benefit of creditors has power to work up material ready for manufacture, and to purchase new material where necessary to work up the old, if, in the judgment of the assignee, it will benefit the assigned estate. (Burrill on Assignments, sec. 396; Woodward v. Marshall, 22 Pick., 468.)

Where the creditors have authorized it, an assignee may carry on the business and purchase new stock from time to time, although not necessary to work up the material on hand. (Mussy v. Noyes, 26 Vt., 462.)

2. The commissioner allowed the Trust Company, and the chancellor approved his finding, the usual commission of five per cent upon the

Hill, &c., v. Cornwall & Bro.'s Assignee, &c.

amounts received and disbursed by it as assignee of Wm. Cornwall, Sr., and Wm. Cornwall, Jr., and as the sums which passed through its hands as assignee of Cornwall & Brother were sometimes necessarily the same money handled and rehandled by it in the course of carrying on the factory business, he allowed the assignee as commissions from the estate of Cornwall & Brother only a lump sum of \$2,500, instead of five per cent commission, which, in the case of Cornwall & Brother, would have amounted to more than \$3,500. This was not excessive.

3. The fees allowed counsel are reasonable, just and fairly based upon the importance, amount and value of the great interests involved.

HUMPHREY & DAVIE AND BLAINE & KINKEAD FOR MERCHANTS NATIONAL BANK.

1. As to usury. Where a note containing usury has been assigned, and the maker pays the note to the assignee, or executes to him a new note, a cause of action for the usury arises at once, by the maker of the note against the original payee. (*Stone v. McConnell*, 1 Duvall, 56; *Breckinridge v. Churchill*, 3 J. J. Mar., 12.)
2. The only law to be applied to the subject of usury where a national bank is involved, is the National Bank Act. (*Brown v. Marion National Bank*, 13 Ky. Law Rep., 812; s. c., 92 Ky., 608; *Sydner v. Mt. Sterling National Bank*, 15 Ky. Law Rep., 4.)
3. The plea of usury must, therefore, conform to the National Bank Act, and must contain the allegation that the reserving or charging the rate of interest greater than is allowed by law has been "knowingly done." (*Henderson National Bank v. Alves*, 12 Ky. Law Rep., 724; s. c., 91 Ky., 142; *Schuyler's New York Bank v. Bollong*, 24 Neb., 825; s. c., 40 N. W. Rep., 413.)
4. Where there has been a series of notes renewed from time to time and usury charged on each note, if the discount is paid, then it can not be considered as an offset to the note. If the discount is added in to the face of the note, then the note sued on can be abated by all usury contained in it. (*Driesbach v. National Bank*, 104 U. S., 52; *Barnett v. National Bank*, 98 U. S., 555; *Brown v. Marion National Bank*, 13 Ky. Law Rep., 812; s. c., 92 Ky., 608; *Sydner v. Mt. Sterling National Bank*, 15 Ky. Law Rep., 4; *Farmers & Mechanics Bank of Missouri v. Hoagland*, 7 F. R., 159.)
5. The Merchants National Bank had the right to prove its debt against the private estate of William Cornwall, and against the partnership estate of William Cornwall & Brother. This rule is settled, where both the firm and an individual make an assignment. (*National Bank v. Bank of Commerce*, 94 Ill., 271.) The modern English rule allows double proof. The American rule has always allowed double proof. (17 A. & E. E. L., 1210; *Ex parte Nason*, 70 Me., 366; *Borden v. Cuyler*, 10 Cush., 477; *Emory v. Canal National Bank*, 3 Clifford,

H. A. J. Cornwall & Brother's Assignees, &c.

- 567; s. c., 7 N. B. R., 219; *In re Thomas*, 17 N. B. R., 43; *In re Foster*, 12 N. B. R., 237; s. c., 8 Ben. U. S., 225; *Mead v. National Bank*, 2 N. B. R., 173; s. c., 6 Blatch. U. S., 189; *In re Elger*, 2 N. B. R., 371; s. c., 3 Ben. U. S., 146; *Cady v. Thompson*, 60 A. R., 593; s. c., 8 S. R., 45. The case of *Fayette National Bank v. Kentucky*, 79 Ky., 135, is not in point, because there the debt was admitted to be a partnership one, with the partner simply as surety.
6. The amount of interest in the factory property, claimed by Mrs. HILL, should have been subjected to the debts of William Cornwall and Cornwall & Brother. In Kentucky one can not reserve to himself the absolute disposition of property and yet prevent it from being subjected to his debts. *Bland's Adm'r v. Bland*, 90 Ky., 409; *Bull v. Kentucky National Bank*, 90 Ky., 453; *Dumesnil v. Dumesnil*, 18 S. W., 229; s. c., 92 Ky., 527. The cases of *Jones, Assignee, v. Clifton*, 101 U. S., 225, and *Nichols v. Eaton*, 91 U. S., 716, are not binding, being constructions of the Bankrupt Law, and not of our statute.
7. William Cornwall, Sr., has exercised his power of appointment. A deed will be considered as an execution of a power, even though the power may not be referred to, if it would not be otherwise effectual. (*Terry v. Roderhan*, 79 Ga., 278; s. c., 11 A. S. R., 420; *Grindat v. Montgomery Gas Light Company*, 82 Ala., 596; s. c., 60 A. R., 769; *South v. South*, 91 Ind., 221; s. c., 46 A. R., 592; *Funk v. Eggleston*, 92 Ill., 546; *Warner v. Connecticut Mutual Life Insurance Co.*, 109 U. S., 365.)

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

In the month of March, 1891, Cornwall & Brother made an assignment for the benefit of creditors, and each member of the firm also made an individual assignment for the same purpose. The firm was composed of William Cornwall and his two sons, Wm. Cornwall, Jr., and Aaron W. Cornwall. The business of the firm was the manufacture of soap and candles, and being largely indebted individually, as well as partners, many questions have arisen touching the character of the assets and the mode of payment or distribution of the trust fund between creditors. The Louisville Trust Company was made the assignee, and filed this petition below, asking advice as to the administration of the several trusts, and for a final settlement of its accounts as assignee.

They owned real estate consisting of the soap factory proper, and the warehouse adjoining, that was used in the business. It is claimed by the firm's creditors that this realty was partnership property, purchased and used for that purpose, and therefore to be treated as personalty and liable for the partnership debts, and, on the other hand, it is claimed to be realty, and a claim to a potential right of dower asserted by the wives of William Cornwall, Jr., and Aaron Cornwall.

It is further claimed that Mrs. Hill, a daughter of William Cornwall, Sr., and sister of the other two members of the firm, is the owner of an undivided one-third interest in the *factory property*, under a conveyance from her father, made and recorded long prior to the assignment, and that the firm is indebted to her for the rent of this one-third interest for many years, and this rent Mrs. Hill seeks to recover. The manner in which this property was held, and the interest of the several claimants in it, will be considered before determining the remaining questions presented. If the factory and warehouse building belonged to the firm, then the wives of William and Aaron Cornwall have no claim to dower, as the entire property is insufficient to pay the partnership debts.

The elder Cornwall had been engaged in the same business with his brother, John Cornwall, for many years, when John Cornwall died, and the partnership ended. The factory property was then sold by a decree of the Louisville Chancery Court, and William Cornwall, Sr., through his son, William, purchased the factory, and in March, 1870, a commissioner's deed was made to William Cornwall, Jr., for the entire factory. The father, William Cornwall, Sr., owned at the time of the sale one-half of

Hill, &c., v. Cornwall & Bro.'s Assignee, &c.

the factory, and therefore had to pay only one-half of the proceeds of sale, or the purchase money. In a few days after the sale, his son, Wm. Cornwall, Jr., conveyed to his father two-thirds of this factory, retaining the title to the one-third by gift from his father. The sons had no estate, or, at least, the entire capital for conducting the firm was furnished by their father. The business was continued under the old firm name of Cornwall & Brother, but it is manifest that the factory was purchased for partnership purposes, and, although paid for by the capital furnished by the father, the payment was out of partnership funds, and the property used for partnership purposes. While it is true Aaron Cornwall did not arrive at age until 1874, three years after the purchase at the decretal sale, when he did arrive at maturity his father conveyed to him an interest of one-third in the factory, and in the year 1875, he conveyed the remaining third interest in the factory to his two sons, in trust for his daughter Sally, now Mrs. Hill. So it appears that Wm. Cornwall, Sr., had divested himself of the legal title to this property, or of his interest in it as purchaser, under the decree to his three children. That Mrs. Hill was not a partner is evident, as she seems to have had no connection with the factory or its manufactures, her two brothers holding the title for her, and in fact she had been receiving rent for this one-third interest.

While William Cornwall, Sr., had divested himself of the legal title to the factory building, he had furnished all the capital with which to run it, and was certainly interested as a partner, and when looking to the character of the partnership, and the conveyances from the father to his two sons to enable them to have capital, as

well as himself, in the enterprise, it can not well be argued that the senior Cornwall had no equitable right to have the entire property applied to the payment of the partnership debts. In their days of prosperity they might well have said, as they now state, that this realty was not considered or treated by the firm as partnership property. Yet the firm books demonstrate that this one-third interest conveyed to each son constituted his capital invested in the enterprise, and that such must be the result of the acts and conduct of all the parties.

Wm. Cornwall states that this property was purchased for the purpose of being operated by the firm, and not only so, but that it had been so operated since that date, Wm. Cornwall, Jr., being then the only partner. The senior Cornwall, as the books of the firm show, put into the concern at the beginning a large sum of money. There was no one else to furnish the capital.

The factory sold at decretal sale for \$44,500, and on the books of the firm the senior Cornwall is credited by his half interest, which is \$22,250. There is an account on the books styled the "building, land and machinery account," and from it can be seen what was paid by the firm for the buildings, land and machinery, and the entries on the books show that the money due on the purchase of this factory was paid out of the firm money, and this firm money was the cash paid into the firm by Cornwall, Sr., and for which he was credited on his individual account, and went to pay what the firm owed for the one-half interest owned by John Cornwall, who was a member of the old firm.

The *building and machinery* account is charged with the one-half interest of Wm. Cornwall, Sr., and he is credited

Hill, &c., v. Cornwall & Bro.'s Assignee, &c.

by it. Wm. Cornwall, Jr., is credited on the books with the value of his one-third interest that had been conveyed him by his father, and his father is charged with the amount, transferring or giving to his son in this way that much of his, *the father's*, capital. Like entries were made when Aaron Cornwall was given his one-third interest, Aaron being credited and his father charged with the amount.

The value of the third of the property conveyed to Mrs. Hill was credited to the *building*, land and machinery account, and this was proper, as that account had been charged with the entire cost. It must be assumed that all the partners consented to this conveyance to Mrs. Hill, leaving two-thirds of the building as property liable for partnership debts, and, in fact, partnership property. The factory and warehouse were both assigned by these partners as partnership assets, and the property or its value is found on the balance sheets of the firm's business down to the date of the assignment.

The warehouse property was paid for by the firm—it was bought for firm purposes and used as such. We have but little doubt on this question, and while the property held under these separate deeds would be treated as realty after paying partnership liabilities, it must be regarded as partnership property; and was properly subjected to the payment of partnership debts.

The fact that separate conveyances were made to the sons by the father can not make it individual estate, because it was used and treated as a part of the partnership. If each of the three partners had owned a one-third interest before forming the partnership, and had agreed to erect a factory on the land and to credit each by the

Hill, &c., v. Cornwall & Bro.'s Assignee, &c.

value of his interest on the firm books as capital furnished, could there be any reason for holding the property not primarily liable for partnership debts? We can perceive none, and while the wife of each would be entitled in such a case to dower, as the title was held before the partnership was created in this case, the factory was purchased for partnership purposes, paid for out of the partnership funds, and used for partnership purposes. In *Spalding, &c., v. Wilson & Muir*, reported in 80 Ky., 589, where the conveyance was made to the two partners jointly, it was held that this made no difference. *The property was purchased for partnership purposes and appropriated to those purposes and paid for by partnership funds. It therefore becomes partnership property.*

In *Carter v. Flexner*, 92 Ky., 400, this court, in the endeavor to reconcile the conflicting decisions and views of judges in regard to what has been often termed the *intention of the parties*, said, *that where partners own real estate as partners it can not be treated or considered as personally except for the purposes of the partnership, and then as assets for the payment of the firm debts.* Facts must exist showing that real estate is partnership property before it can be treated as personalty for partnership use and the payment of partnership debts. The partners having the legal title to land in a court of law the property must be regarded as realty, but when going into a court of equity, if partnership property, it must be used for the partnership purposes, and we are to determine from the facts before us whether the realty was purchased with the funds of the partners and for partnership purposes and so used. If so, it becomes trust property for all the purposes of the partnership and the payment of the partnership liabilities. After the partner-

Hill, &c., v. Cornwall & Bro.'s Assignee, &c.

ship ceases and the debts are paid, we must, if any realty is left, determine the mode of descent or inheritance by the conveyance itself, without reference to its having been once used as partnership property. The chancellor below was correct in his conclusion when holding that no potential right of dower existed.

The creditors, who are the appellants as to the point now raised, insist that Mrs. Hill, the daughter of Wm. Cornwall, Sr., has no interest in this *factory property* free from the claims of creditors, by reason of the conveyance under which she holds. On the 7th of January, 1875, her father executed to her two brothers, Wm. Cornwall, Jr., and Aaron Cornwall, a conveyance of an undivided one-third interest in the factory, in trust for the sole and separate use of Sallie W. Cornwall (now Hill), with this proviso: "That the party of the first part hereby reserves to himself full and all species of power to revoke each or any, or some or all, of the uses hereby created, and to cause them to shift to other person or persons, including himself, as he may choose, or to cause new uses to spring to the use of some other persons or person, including himself."

The contention is that such a conveyance would not, in equity, divest the grantor of title as against creditors; that our statute makes trust property liable for the debts of the *cestui que trust*, and this was a holding in trust for the grantor; and lastly, the grantor has executed the power of appointment for the benefit of creditors in the assignment made to the Louisville Trust Company. The conveyance to the daughter, Mrs. Hill, was made at a time when the grantor (her father) was in a prosperous condition and with ample means to make such a transfer

to his daughter with a view to providing for her future wants, and no complaint is made as to any improper motive on the part of the grantor in executing the conveyance, and if made, these creditors were in no wise affected by it, and, besides, it was executed from the purest and best of motives. It was executed nearly fifteen years before his financial troubles, and the grantor was endeavoring to provide for his daughter as he had for his two sons, to whom he had given or conveyed a similar interest.

It is contended that the reservation of power, with the right of appointment, destroyed the conveyance by the grantor to his daughter, and left him, so far as creditors are concerned, as if no conveyance had been made. There can be no doubt but that the title passed from the grantor to the grantee (his daughter) at the date of the conveyance, and if not made for a fraudulent purpose we perceive no reason why the father could not make such a settlement upon his daughter when not affecting the rights of others. She did not hold the property in trust for her father, but the title was in her, subject to the power reserved in the deed, on the part of the grantor, to change the use to, or for the benefit of another. This conveyance was of record; it affected none of these creditors; it was not prohibited by law, and therefore must be regarded as a valid instrument unless revoked under the power.

The statute of this State makes the property held in trust liable for the debts of the beneficiary, and this court has often so decided; but this record presents no such case. The beneficiary is not the debtor of these appellants, but holds under a conveyance from the debtor

Hill, &c., v. Cornwall & Bro.'s Assignee, &c.

that vests in her the beneficial interest, subject to the power of revocation. The statute, we think, has no application to this character of case, and the argument that the reservation of power nullifies the conveyance is answered by the opinion of the Supreme Court in the case of *Jones v. Clifton*, reported in 101 U. S., 225. That case was a conveyance by the husband to the wife of certain realty, the deed containing a clause reserving to the grantor "the power to revoke the grant in whole or in part, and to transfer the property to any uses he might appoint and to such person or persons as he might designate, and to cause such uses to spring or shift as he might declare." The conveyance was made at a time when the husband was not involved, but subsequently became embarrassed and was adjudged a bankrupt. The assignee in bankruptcy contended that the deed passed no interest to the wife as against creditors, but was fraudulent as to future creditors, the husband retaining and controlling the use of the property, and further insisted that the power of revocation and appointment passed to the assignee for the benefit of creditors. The Supreme Court held, through Mr. Justice Field, that "the right of a husband to settle a portion of his property upon his wife and thus provide against the vicissitudes of fortune, when this can be done without impairing the existing claims of creditors, is indisputable." The court proceeded, also, to say "the powers of revocation and appointment to other uses, reserved to the husband in the deeds in question, do not impair their validity or their efficiency in transferring the estate to the wife, to be held by her until such revocation or appointment be made." It was also held, in the same case, that such a power was

not an interest in the property that could be transferred to another, or sold under execution or devised by will, or that passed to the assignee. Such is the doctrine on the subject, and has been modified by our statute of wills to the extent only that a devise of one's own estate, who has a discretionary power of appointment, shall operate as an execution of the power unless a contrary intention shall appear by the will.

It is claimed that the grant to the daughter was revoked by a deed of revocation at one time prepared by the father for that purpose and destroyed. The testimony of the grantor shows that this writing was executed to enable those who were engaged in the business of making soap and candles to form a sort of trust, in which like partnerships or companies could combine, with the title to the factories owned by each invested in the one head; that this contemplated movement failing, the revocation was never carried into effect, either by notice to his daughter or by any writing obligatory on either party, and we are satisfied that no revocation was ever made.

The wife of Wm. Cornwall, Sr., with whom he had not been living for years, asserted dower in the real estate assigned, and in order to obtain her relinquishment it was agreed, for a consideration expressed, that the wife should relinquish dower in the estate assigned and describing the factory as a part of the realty that had been passed to the assignee.

The object of this deed was to release all right to dower in the property assigned—nothing more. It was not the purpose or intention of the grantor, in the midst of his pecuniary embarrassments, to take from his daughter the estate he had given her and thereby involve her

Hill, &c., v. Cornwall & Bro.'s Assignee, &c.

in financial ruin. He did propose to creditors that he would revoke the grant if they would settle upon terms that had been submitted to them. His proposition was not accepted, and we find no evidence in the record justifying the conclusion that the power reserved by the grantor in the conveyance to his daughter had been executed, but on the contrary, the facts indicate a purpose not to deprive the daughter of the estate conveyed, except upon certain conditions, and the chancellor very properly refused to subject her estate to the demands of creditors. The chancellor also adjudged properly in refusing to allow rent to Mrs. Hill for her interest in the factory after the year 1885. The scarcity of financial means is assigned as the reason for failing to pay this rent, but this can be no response to the claim in the absence of other facts and circumstances bearing on the question.

The dominion exercised by the grantor over the property conveyed to his daughter, and his pecuniary necessities, doubtless induced him to withdraw his liberality toward the daughter, and she failed to assert any claim for the reason that her father had, not only prior to 1885, paid her the most of the rent, but prior to and after that time had advanced to her considerable sums of money—more than would have compensated her for the rent, and it is a fair inference, to be gathered from payments made for both the daughter and her husband, that no claim for rent was intended to be asserted; and it would be inequitable, under the circumstances, to compel her father to pay it, or take from his creditors any part of his or the assigned estate for that purpose.

On the appeal of Eleanor Cornwall from that part of

the judgment denying her claim for nine thousand dollars, the following facts are made to appear: She is the wife of Wm. Cornwall, Jr., and on the 21st of July, 1875, a relative, Miss Henrietta Ormsby, conveyed to her a vacant lot on Ormsby avenue. The lot was valuable, worth seven or eight thousand dollars. A dwelling was erected upon it by the husband in a short time and they occupied it as a home. The house was erected many years before the financial troubles of the firm. In the year 1890 this property was sold to Bonnie for seventeen thousand dollars, five thousand of which was paid in a check to the wife, and two notes executed to her for the balance. The husband took charge of the cash and doubtless used it. Shortly after this sale, the banks to which the firm of Cornwall & Bros. were indebted in large sums, began to press them for money. The notes of the purchaser had been paid, and the firm, through its members, at least Aaron Cornwall, obtained this money from the wife through the husband. The money was obtained and placed by the firm, through its book-keeper, to the credit of Wm. Cornwall, Jr., the husband. Aaron Cornwall, knowing how the money was obtained and to whom it belonged, placed opposite to the credit given his brother the words "His wife's money," and when they had obtained over seven thousand dollars of the wife's money a note was executed to her by the firm for that amount, and after this other sums were borrowed, increasing the amount loaned by the wife to nine thousand dollars. That the firm knew the money credited to Wm. Cornwall, Jr., was his wife's money, and that the husband used it for investment for the wife, is undoubted, and their obligation to secure it equally certain.

Hill, &c., v. Cornwall & Bro.'s Assignee, &c.

Aaron Cornwall, the member of the firm, knew it was the wife's money, and when used, evidences of its being hers were always connected with its use. The husband recognized it as the wife's money, and it was repaid her by the firm in this way: Wm. Cornwall, Sr., owned a house and lot on Main street and was desirous of securing Mrs. Cornwall and of raising other money to meet the urgent demands of creditors. They state that, upon consultation, it was thought a mortgage upon the property would hasten what they were trying to avoid, viz.: an assignment of their property, and in order to relieve the creditors for the time being, Wm. Cornwall, Sr., sold to Wm. Cornwall, Jr., this house and lot on Main street for twenty-seven thousand dollars, executing a deed reciting a consideration of nine thousand dollars in hand paid, which was in satisfaction of the money due Mrs. Cornwall, and the notes for the balance belong to creditors or the assignee of Wm. Cornwall, Sr. Counsel were advised with in reference to securing the wife in this manner, and Wm. Cornwall, Sr., as well as the other members of the firm, consented to it, and the note for seven thousand dollars or more was left in the hands of Aaron Cornwall. It was a surrender by Wm. Cornwall, Sr., of his own estate to pay his son's wife, with the balance to be applied to the indebtedness of these assignors.

When the deed of assignment was made, the assignee was informed of the nature of the claim of Mrs. Cornwall. He paid off the bonds executed for the property by Wm. Cornwall, Jr., and the balance of the proceeds are in his hands for Mrs. Cornwall or those entitled. This is no stale claim asserted by the wife, nor is it affected by even a suspicion of unfairness or fraud; but with bankruptcy

impending over the firm, of which her husband was a member—his individual estate wrecked as well as the partnership—it is argued that the wife voluntarily sold her house and placed the proceeds of the sale in her husband's hands that all she had might be swallowed up in the general financial crash. Such a view of the acts and conduct of the parties is not sustained by the testimony, but on the contrary it is evident this money was borrowed as the wife's money and invested by those whose duty it was to invest it, in this Main street property.

That the proceeds of the sale of the home of the wife became her separate estate, and was so regarded, clearly appears; and whether the wife was or not a competent witness, or the husband for the wife, the testimony of the other members of the firm shows the manner in which the money was obtained, to whom it belonged, and its being made secure in the conveyance of the Main street property. The note to the wife by the firm, the husband being a member, must create a separate use in the wife, otherwise it could have no effect in law or equity. (*Maraman v. Maraman*, 4 Met., 89.)

That the conveyance was made to the husband, omitting the wife's name, is not in the way of recovery. That she was beneficially interested to the extent of the money loaned the firm is evident, and in the effort to secure her and invest her money, the fact that the deed was made to the husband without her knowledge and in the belief that it would secure her, preserves instead of destroying the trust. He held the property in trust for the wife to the extent her money was invested in it. No creditor of the debtor and husband is wronged by pro-

Hill, &c., v. Cornwall & Bro.'s Assignee, &c.

protecting the wife in a case like this. They could have given no credit to the husband on the faith of the wife's estate, to which she had the legal title. He had not used her money for years in the conduct of his business, as is usual in such claims, and when a bankrupt, his wife asserts her claim under some latent equity that her money was to be held in trust or invested for her benefit, but on the eve of his bankruptcy and with a knowledge of his condition, the wife permits the loan of her money to the firm, of which he is a member, and takes from the firm a note evidencing the agreement to pay her and not the husband. The justice of the claim can not be questioned, and if equity will interpose for the protection of those laboring under the disability of coverture, and secure what a confiding wife has placed in the hands of her husband to be invested for her, no case could be presented presenting stronger facts for relief than the one before us. In our opinion the chancellor erred in refusing to allow the appellant, Mrs. Cornwall, the nine thousand dollars invested of her money in the house and lot conveyed by Cornwall, Sr., to his son, William, on the 31st of January, 1891.

On the appeal of the Merchants National Bank, a creditor of the firm of Cornwall & Brother, the question as to the right of the bank to make double proof arises—that is, its right to prove its debt not only against the firm of Cornwall & Brother, but also against the individual assets of William Cornwall, Sr., William Cornwall, Jr., and Aaron Cornwall, all three of whom constituted the firm of Cornwall & Brother. It is said, and this is true, that there was not a joint assignment of both partnership and individual property, but separate assignments, first,

by the partnership, and then separate assignments by each member, of his individual estate, and the question asked is, who are the *cestui que trusts* in these several deeds, and the answer must be that all the creditors are the beneficiaries in each deed. But the question again arises, how are the assets from each assignment to be distributed between partnership and individual creditors. We can perceive no distinction between a joint assignment where the firm assets and the individual assets are assigned, and the case where each makes a separate assignment. The equitable rule is the same, and must be applied in the same way. It is conceded that at law firm creditors have no lien upon the firm assets, and no contract right by which an individual creditor must stand aside until the partnership creditor is satisfied, but a court of equity gives to the firm creditors a lien through the partners, who have the right to demand the payment of firm debts before the partnership property can be applied to the individual debt of one of the partners, and this rule of equity giving the creditor of the firm priority over the individual creditor as to the firm assets, was so extended by this court in the case of the Northern Bank of Kentucky v. Keizer, 2 Duv., 169, as to compel the creditor who elects to accept the benefit of this equitable rule, to remain there until the individual creditor out of the individual assets is made equal with him. Counsel for the Bank have cited many authorities in other States, including those from the Federal Judiciary, establishing a different doctrine, and present with much force a line of reasoning sustaining their view of this equitable doctrine. The rule in the case of the Northern Bank v. Keizer has been followed or recognized in this State in several reported cases, viz., Whitehead

Hill, &c., v. Cornwall & Bro.'s Assignee, &c.

v. Chadwell, 2 Duv., 432; Spratt's Ex'rs v. First National Bank, 84 Ky., 85, and Fayette National Bank v. Kenney's Assignee, 79 Ky., 133. It was not intended in the last named case to depart from the doctrine as settled in the Northern Bank v. Keizer, and for the reason that if an equity is created or flows from a rule of right, that gives one set of creditors priority in the payment of debts out of one class of assets, those who are required to look for payment to another and different class of assets should at least be made equal before those electing to take this priority should share in the general distribution.

A joint and several liability may afford an equitable reason for giving a lien or rather priority to the partnership creditor in the distribution of the partnership assets, but he may elect not to assert this claim, but share with the individual creditor in the distribution of the entire assets, and to give the firm creditor priority in the first place, and then allow him to share with the individual creditor in the distribution of the individual assets is neither equitable nor just. The firm creditor in fact credits the firm, and while each member is individually liable also, the creditor is not allowed his priority because he has taken the precaution to have all the firm bound, but for the reason the partners have the right to have the firm assets applied to the payment of the partnership debts. The equity of the creditor comes in this way, and equity must come to the relief of those who are required to look on until the firm creditor has been paid. We adhere to the rule as settled by this court, however high the authority elsewhere.

The defense of usury was set up by Mrs. Hill. who had

asserted her claim for rent, against the bank, and it is contended that she was not a creditor and could not therefore make such a defense, and if a creditor, that the plea of usury is not good. The law to be applied to this bank is that found in the National Bank Act, under which this bank was organized. Many of the notes executed by this firm to the bank had gone into the hands of third parties and been paid; other notes have been discounted by other banks, and long intervals between renewals, so that it is impossible to reach a correct conclusion as to what usury was paid, and when paid. It is sufficient to say that the court below has conformed to the banking law, and the usury deducted is not for a larger sum than was proper; and if the pleadings are bad, it appearing from the record that there is usury, the case would be sent back with leave to amend, but as the chancellor has deprived the appellant of interest to the extent authorized, we are not disposed to reverse the case on account of any defect in the pleading.

A question of usury also arises in the appeal of the Bank of Louisville, and this must be decided under the usury laws of this State, and looking to the various decisions, we think the bank has no cause of complaint. It is insisted that Mrs. Hill, as in the case of the Merchants National Bank, had no right to make the plea of usury. She had set up a claim against the firm of Cornwall & Brother for rent, and by the judgment below, and now affirmed by this court, it has been held she was not entitled to recover. Still it appears from the record that usurious interest had been charged by the bank—that usurious interest had been ascertained, and in this controversy between creditors, where the assets are insuf-

Hill, &c., v. Cornwall & Bro.'s Assignee, &c.

ficient to pay the debts, the chancellor should take notice, although no plea is entered, of the usury sought to be recovered, and reject the claim to that extent. In fact, in any case where it is plain from the record that the party is seeking to recover usury the chancellor should refuse to give judgment for the usury.

The case of *Smith v. Young, &c.*, 11 Bush, 393, has, in effect, been overruled in more than one reported case, and in several MS. opinions. A payment made at the date of the renewal, although regarded as a payment of the usury and the note renewed for the principal, will be regarded as a payment on the principal, and although the note may be in the renewal signed by others than those originally bound, if the original obligor is still bound all usury will be purged from the transaction so long as he remains liable. *Hart, &c., v. Hayden, &c.*, 79 Ky., 346; *Rudd v. Planters' Bank*, 78 Ky.; *Fitzpatrick v. Apperson's Ex'or*, 79 Ky., 272. The chancellor, therefore, properly refused to render any judgment for the usury, when, from the record, it was made to appear that the bank was seeking to recover it. The contract, as to the usury, is void and can not be enforced. *Lucking's Adm'r v. Gegg*, 12 Bush, 300.

It is claimed by the bank that the assignee mismanaged and wasted the assets, and should be held responsible. It seems that a meeting of the creditors (excluding the appellant), with an advisory committee at their head, authorized the continued operation of the factory to prevent the loss of assets, and to work up the material then on hand. It was supposed that a factory in full operation would be more likely to be sought after than one that had been abandoned, and to preserve the business of this factory and add to its value it was the part of wisdom to

operate it, although there may have been a loss sustained. We see nothing in the record that would authorize the chancellor to condemn the judgment of the assignee, when it is manifest that all parties acted in the best of faith, and with a view to advance the interest of creditors. The raw material on hand had to be manufactured—this valuable plant, with its trade-mark and business known in all parts of the country, had to be preserved—depreciation in value was what the assignee and the creditors desired to avoid, and the plan adopted was wise in its inception, and the exercise of the judgment of the assignee and nearly every creditor. There is nothing to complain of on account of the assignee's action in the premises. Nor is there any ground of complaint by reason of the allowance to the assignee. The entire assets were of the value, as is stated, of \$200,000, all of which passed through the hands of the assignee. As to the fees of counsel the case comes to this court with proof sustaining the claim. There was a continuous service for two years with questions arising of the greatest importance to the assignee and the creditors. The fee is eight thousand dollars, and while the sum may appear large, we can not assume from the record that it is unreasonable. The chancellor approved the allowance, and is fully sustained by the testimony, without any conflicting proof.

There remains another question, left undecided when the original opinion was delivered, in regard to the judgment of sale of Mrs. Hill's interest in the factory. The court, in reading the record, considered the question as pertaining to property involved in another case in which Cornwall's assignee was interested, and in this was mistaken.

Mrs. Hill claims that she was the joint owner of the

Hill, &c., v. Cornwall & Bro.'s Assignee, &c.

factory proper, and in this she is sustained by this court ; but she further insists that the chancellor had no power to order a sale of her interest at the suggestion of a creditor who has alleged that the property was indivisible, and being a vested interest in possession should be sold as a whole as authorized by section 490, Civil Code. The right to sell the whole property in case of a joint holding, under section 490 of the Code, may be asserted by one of the joint owners against the others, and with the case made out as provided by that section, a court of equity will order the sale. The right to sell in such a case is purely statutory, and the statute must be followed, and, although a creditor of the insolvent assignor has a beneficial interest, the chancellor's jurisdiction is confined to cases where one joint owner sues another joint owner, and no individual or firm creditor can step into the shoes of the assignee and, because he may have a beneficial interest, large or small, assert the right to have the entire property sold. Cases might occur where the assignee, from the charges in a petition, and proof to that effect, is wasting the estate and subjecting the property to sale at a sacrifice for the interest of one joint tenant, that a court of equity would interfere; but we have no such case here, and if any creditor can sue at pleasure, regardless of the assignee who has the legal title, it not only produces confusion, but opens the door to this statutory relief for all parties interested in the estate. The assignee in this case brought no action of this character, and while it may appear that a sacrifice of the property would result if not sold as a whole, it affords no reason for entertaining a jurisdiction unknown to the common law and not conferred by statute. The assignee may be clothed with the

Risner v. Commonwealth.

mere legal title for creditors, still he is the party to sue, and if otherwise, contests would soon arise between the assignee and creditors, and every one interested asserting his right under this provision of the Code.

The judgment is therefore reversed as to Mrs. Eleanor Cornwall, with directions to enter a judgment for her for the amount indicated, and also reversed in so far as it directs the sale of Mrs. Hill's interest in the factory, and must stand approved in every other respect. This is not intended to preclude the assignee from asking the relief sought by the creditors as against Mrs. Hill.

CASE 91—INDICTMENT—MAY 10.

Risner v. Commonwealth.

APPEAL FROM MAGOFFIN CIRCUIT COURT.

1. **SELECTION OF JURY.**—Where, under the existing jury law, the jury commissioners were not directed by the court, as the statute prescribes, to place in the drum or wheel-case the names of two hundred persons qualified for jurors, which was the number required for the particular county according to its population, but instead were required to and did select and put in the drum or wheel-case only fifty names altogether, and from that list the requisite number of grand and petit jurors was obtained, there was such a failure to comply with the law as entitles one who was tried and convicted by a jury made up from the list of petit jurors thus obtained to a new trial, although it does not directly or certainly appear that he was substantially prejudiced thereby. And the fact that after the list of twenty petit jurors thus obtained was exhausted in the effort to make up the jury to try the defendant, the jury commissioners, being reconvened, were directed to, and did, place in the drum or wheel-case the names of two hundred persons, from which the trial jury was completed, did not cure the original failure to do so.
2. **SAME.**—There having been a failure to appoint jury commissioners at the previous term of the court, it was in the power of the court to then

95	539
e110	853.
110	854
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e127	90

Risner v. Commonwealth.

proceed to obtain grand and petit jurors in the mode prescribed by the statute, and to that end to appoint jury commissioners.

A. ARNETT FOR APPELLANT.

The jury that tried the case was not selected and impaneled in the manner prescribed by law.

WM. J. HENDRICK, ATTORNEY-GENERAL, FOR APPELLEE.

As to whether the jury was secured in accordance with law, see chapter 210, page 948 of Acts 1891-2-3, and especially section 27 of article 4 of that Act.

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

Samuel Risner and Leander Risner were jointly indicted for murder and each convicted of manslaughter, though the latter only appeals.

The only ground for reversal that we will consider or that, in our opinion, is sufficient to authorize reversal, is failure of the lower court to obtain the jury by whom they were tried in the mode prescribed by "An Act concerning juries," which was approved May 22, 1893.

The transcript in this case is made out so unskillfully that we have had some difficulty in ascertaining precisely when and in what succession the various orders on the subject were made by the lower court, for some of them are not even dated. And to increase the confusion the original transcript did not contain all the orders, the omitted portion having been added since it was filed here.

It, however, appears that January 29, 1894, being the first day of the term of court, the following order was made: "It appearing to the satisfaction of the court that the grand and petit jurors, selected and drawn by the jury commissioners, appointed at the October term, 1893, of this court, and summoned by the sheriff as grand and petit jurors for the present term of this court, were not

Risner v. Commonwealth.

selected and summoned as required by law, it is therefore ordered that all said jurors, grand and petit, be discharged as such for the present term of this court."

On the same day, January 29th, an order was made appointing three jury commissioners for the period of one year from that date, who were directed to draw *twenty* names for grand jurors and *thirty* names for petit jurors at that term of court. And the commissioners on that day delivered to the judge in open court the jury lists under seal for that term, which were then delivered to the sheriff, who was directed to summon the persons named to appear on the *third* day of the term of court to serve as grand and petit jurors. On fifth day of the term, being February 2, 1894, was made the following order: "All the names in the drum or jury-wheel being drawn by the judge of court, and the jury not being completed, it is ordered that the jury commissioners reconvene for the purpose of selecting other jurors." Following that order is a recital that "said commissioners, after selecting one hundred names and placing them in the jury-wheel, returned same into court and delivered the same to the judge, who drew from said wheel one hundred names, as required by law, to serve as jurors at this term, and the clerk is ordered to certify said list to the sheriff who is directed to summon each and all of said one hundred jurors."

In another part of the transcript, however, it is recited that "said commissioners delivered in open court to the judge the drum or wheel-case containing the *two* hundred names and the key and slips not used. Thereupon the court drew from said drum or wheel-case, *one hundred* names, one at a time, and recorded each name upon a sheet of paper in the order which they were drawn, and certified

Risner v. Commonwealth.

the same and delivered the list to the sheriff, who was directed to summon all whose names were on the list, which he did. And out of said list as drawn and summoned, the jury was completed."

By section 1 of the existing statute on the subject (Section 2241 of the Kentucky Statutes), the circuit judge of each county was required at the first regular term of the circuit court therein after the act took effect and annually thereafter, to appoint three proper persons as jury commissioners for one year. And the process by which they were required to obtain the necessary number of jurors, is to take the last returned assessor's book for the county and from it carefully select, from intelligent, sober, discreet and impartial citizens, housekeepers in different portions of the county, a number of persons corresponding to population thereof, the number required for Magoffin County, where appellant was tried, being not less than two hundred; each name so selected to be written on a slip of paper, and the slips deposited in a revolving drum or wheel-case, from which is to be drawn a sufficient number of names to procure twenty persons qualified to act as grand jurors, and thirty persons to act as petit jurors; each list to be recorded on paper and placed in a sealed envelope directed to the judge of the circuit court, and constitute the grand and petit jurors for the ensuing term of court. When the lists have been thus completed it is the duty of the commissioners to lock the drum or wheel-case containing the remaining names and deliver it to the judge of court, who shall then place it and the sealed envelopes in custody of the clerk.

Section 2 provides that if at any time it becomes apparent to the judge the names in the drum or wheel-case will be exhausted before the next annual selection of commis-

sioners, he, by an order entered of record, shall reconvene the commissioners, who shall select and place in said drum or wheel-case the number of names of qualified grand and petit jurors, stated in the order of the court reconvening them.

Section 3 provides that at each term, within one year after commencement of that at which the commissioners were appointed, the judge of the court shall draw from said drum or wheel-case the names of twenty qualified grand jurors and thirty petit jurors, and shall place the lists in separate sealed envelopes from which the next grand and petit jurors are to be drawn.

Though it does not appear in what respect the jurors were selected and drawn illegally at the October term, 1893, we suppose it was because done in pursuance of the General Statutes which were repealed by the statute of May, 1893. But whatever may have been the ground for the order of court discharging them, which it must be presumed was properly made, the alternative was presented to either supply their places or dispense altogether with both grand and petit jurors for that term of court. And though such condition as resulted from that order is not in express terms of the existing statute provided for, we think it was in the power of the court to then proceed to obtain grand and petit jurors in the mode prescribed by the statute and to that end appoint jury commissioners, which seems not to have been done as required at the October term, 1893. But the jury commissioners were not directed by the court, as the statute prescribes, to place in the drum or wheel-case the names of two hundred persons qualified for jurors, from which to draw and return to court twenty grand and thirty petit jurors. But

instead they, under order of court, selected and put in the drum or wheel-case only fifty names altogether and from that list the requisite number of grand and petit jurors was obtained; and it was only after the list of twenty petit jurors thus obtained was exhausted in the effort to make up the jury to try appellant, which was only partially successful, that the jury commissioners, being reconvened, were directed to and did place in the drum or wheel-case names of two hundred persons as required from which number the trial jury was completed.

The effect of the first order was to give to the jury commissioners more dangerous power and wider discretion in the matter of obtaining jurors than is authorized by either the evident policy or plain language of the statute. And while it is not made to directly or certainly appear appellant was thereby substantially prejudiced, still he had the right to insist upon being tried by only a jury obtained according to the statute, which was passed for the purpose of securing fair and impartial jurors. And to more effectually accomplish that end the names of at least two hundred persons are required in a county of the population of Magoffin, to be selected and placed by the commissioners in the drum or wheel-case and thence blindly drawn by them or the judge of court, as the case might be. Indeed, that particular provision can not be disregarded in any substantial particular without defeating one of the principal purposes of the statute.

It seems to us that error of the court imperatively requires it, and the judgment is therefore reversed for new trial.

CASE 92—PETITION EQUITY—MAY 10.

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Bennett v. Bennett.

APPEAL FROM CAMPBELL CHANCERY COURT.

1. **DIVORCE—EFFECT OF ORDER RESTORING PROPERTY.**—In an action by the husband for divorce, in which he sought by his petition to cancel a deed made to the wife, through a trustee, upon the ground that it had been made solely in consideration or by reason of marriage, an order having been made reciting that, on motion of plaintiff the cause was “discontinued as to property,” an order appended to the final decree of divorce reciting that “all property obtained by these parties in consideration of marriage is respectively restored to them” did not affect the rights of the wife to the property which had been in dispute in that action, whatever may ordinarily be the effect of such an order.
2. **SAME.**—In this action in which the husband seeks to recover of the wife the property in dispute in the divorce suit, and which, he claims, was restored to him by the order made in that case, the record strongly conduces to establish some arrangement in the divorce suit by which all claim to the property was to be withdrawn, provided the defendant would only formally object to the submission of the case and the obtention of the divorce, in order that a divorce might be had at once; and if such an arrangement or agreement shall be established, it should be treated as a forfeiture by the husband of his right ever to claim the property, and upon the return of the case there may be an inquiry into the facts, not only as to such an agreement, but as to the ownership of the property.

JOHN S. DUCKER FOR APPELLANT.

1. The court had full power to settle all property rights of the parties in any litigation subsequent to divorce. The order of restoration rendered by the court, when the divorce was granted, cuts off no equities or rights of the appellants. She lost thereby no rights which the law gives her as the former wife of the appellee. (Sec. 462, Old Code; sec. 425, New Code; Williams v. Gooch, 3 Met., 444; Phillips v. Phillips, 9 Bush, 184.)
2. The evidence fails to show that the deed in question was executed in “consideration” of marriage.

E. W. HAWKINS FOR APPELLEE.

The order of restoration appended to the decree of divorce is conclusive, and passes to the appellee the title to the property in controversy,
Vol. 95--35.

Bennett v. Bennett.

leaving nothing for the court to do but to enforce the order. (McCarty v. McCarty, 10 Ky. Law Rep., 409.)

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

In September, 1890, the appellee obtained a judgment of divorce from his wife on the ground of separation without cohabitation for five years next before the application therefor. In his petition he had sought to cancel a deed for a house and lot in Newport, made by him to his wife, through a trustee, in 1866, upon the ground that it had been made solely in consideration, or by reason of marriage. This the wife, who was in possession of the property by her tenants, resisted, and in her answer alleged that the property had been bought with her own means.

On August 25, 1890, the cause was continued, we presume for preparation on the issue presented in the pleadings, but, on the same day, "by consent," the order of continuance was set aside, and on motion of plaintiff the cause was "discontinued as to property." In a few days thereafter the case was submitted and a judgment rendered, annulling the marriage, but appended to it, in the face of the plaintiff's discontinuance of any claim as to property, was this order: "And all property obtained by these parties during marriage, and directly or indirectly in consideration of the marriage, of which disposition was not made when this action was begun, is respectively restored to them." Thereupon the husband, who is the appellee, brought the present action for the enforcement of the order of restoration, alleging that his late wife refuses to surrender the house and lot directed to be restored to him, as he contends, in the judgment of September, 1890. The wife urges a number of reasons why

the deed should not be set aside, or if set aside, why her receipt of the rents ought not to be disturbed. It is insisted, however, by the appellee, that the judgment of restoration is conclusive of any question of title between the parties, and determines finally that the title has passed back to the original owner, leaving nothing for the court to do but to enforce the order restoring the title.

The section of the Code under which this contention is asserted is as follows: "Every judgment for a divorce from the bond of matrimony shall contain an order restoring any property, not disposed of at the commencement of the action, which either party may have obtained, directly or indirectly, from or through the other, during marriage, in consideration or by reason thereof; and any property so obtained, without valuable consideration, shall be deemed to have been obtained by reason of marriage. The proceedings to enforce this order may be by petition of either party, specifying the property which the other has failed to restore; and the court may hear and determine the same in a summary manner, after ten days' notice to the party so failing." (Civil Code, section 425.)

Of section 462 of the old Code, which was like the new section so far as the point now involved is concerned, this court, in *Williams v. Gooch*, 3 Met., 486, said: "The order of restoration contemplated by this section is a formal one, to be made in cases in which no mention of the property to be restored has been made in the pleadings, and was not designed to apply to any specific property, or to settle any controversy with reference thereto, even between the divorced parties. We doubt whether section 462 was intended to apply to any case in which an issue as to the restoration of specific property is made by the

pleadings in the divorce suit." So in *Phillips v. Phillips*, 9 Bush, 183, it was said of the same section: "The design seems to have been to regulate the mode of enforcing the right of restoration, and not to establish or define such right."

Whatever may be said of the design of this section as it now appears in the Code, certainly it can be given no force in this case, or be construed to affect the rights of the wife to the property in dispute. It would be singular if the plaintiff, who was seeking a divorce and a cancellation of the deed, could obtain the relief he declined to ask for when, if he had continued to ask it, it would have been refused. Except he had discontinued his claim to the property he was not entitled to a trial. An issue had been raised as to its ownership by the pleadings of the defendant first filed, and by avoiding the issue, or in fact abandoning his claim to the property, it is insisted he got an order entitling him to what he had in fact abandoned. Instead of such being the result, it seems to us it might well be argued that the discontinuance of his claim to the property in the action wherein the issue was made as to the ownership worked a forfeiture of the right ever to claim it. Indeed, in her amended answer in this case, the wife charges that "when the plaintiff, by his counsel, agreed with the defendant in September, 1890, in case No. 3833½ (which was the divorce suit), to discontinue all claim to the property involved if a submission were allowed on the claim for a divorce, defendant in good faith believed she would have the house and lot for her own to do with as she saw proper."

It seems to us that the record so strongly conduces to establish some arrangement by which all claim to the

Bennett v. Bennett.

property was to be withdrawn, provided the defendant would only formally object to the submission of the case and the obtention of the divorce, as to defeat the recovery of the property, without a denial of the charge made, or at least an explanation of the deliberate abandonment of any claim to the property in order, seemingly, that a divorce be at once had. The conclusion that there was such an arrangement or agreement is almost irresistible, but the facts may be inquired into on the return of the case, as well as to the ownership of the property. We simply decide that the property rights of the parties are wholly unaffected by the formal order of restoration in the judgment of divorce, though the husband's rights may be precluded by reason of the arrangement indicated. We think that in any event should the chancellor, upon a final hearing of the case, cancel the deed, the rights and equities of the wife are open for adjustment in case No. 2713, in which the property is in the hands of the court's receiver. The cases should be heard together and such orders made as will secure the wife in such part of the estate of the husband as may be allotted to her should the property be restored to him.

Judgment reversed and cause remanded for proceedings not inconsistent with this opinion.

Louisville & Nashville Railroad Co. v. Kentucky Midland Railroad Co.

CASE 93—PETITION EQUITY—MAY 10.

Louisville & Nashville Railroad Company v.
Kentucky Midland Railroad Company.

APPEAL FROM FRANKLIN CIRCUIT COURT.

1. CONSTRUCTION OF CONTRACT BETWEEN RAILROAD COMPANIES AS TO CONNECTION OF TRACKS.—Under a written contract between appellant and appellee, two railroad companies, whereby appellant consented that appellee might construct in appellant's freight yard a track for the purpose of connecting appellee's main track with one of the side tracks of appellant, the connection to be made under the supervision and to the satisfaction of an engineer of appellant, and to be constructed and maintained by appellee at its own expense, each company has the right to use the connecting track for the purpose of interchanging freight and passengers and transfer of cars from one main track to the other, but neither company has the right to occupy it or use it for any other purpose without the consent of the other.
2. SAME.—The writing does not import a mere license given without consideration and revocable at pleasure by appellant, but is in substance and meaning an agreement whereby appellant, for a valuable consideration, sells and grants a joint and equal interest in that part of its freight yard occupied by the track in question.

JOHN W. RODMAN FOR APPELLANT.

1. The writing relied on by appellee is at best nothing more than a license, and the fact that the license is in writing gives it no more force than if it had been verbal. (*Johnson v. Skillman*, 43 Am. Rep., 194; *Wiseman v. Lucksinger*, 38 Am. Rep., 479; *St. Louis National Stock Yards v. Wiggins Ferry Co.*, 54 Am. Rep., 243; *Jackson ex de Hull v. Babcock*, 4 John., 419.)
Licensee is not entitled to notice to quit. (*Doe v. Baker*, 25 Am. Dec., 706; 4 Dev. Law (N. C.), 220.)
2. No easement in or right affecting real estate can be created by contract of the party except by deed. (*Duryer v. Sanford*, 9 Met., 395; *Goddard v. Dakin*, 10 Met., 94; *Moore v. Copeland*, 2 Gray, 802; *Maine v. Cumstin*, 98 Mass., 317; *Wright v. Wright*, 21 Conn., 829; *Stander v. Christmas*, 10 Q. B., 135; *Bichford v. Parsons*, 5 C. B., 920; *Wood v. Leadbetter*, 13 M. & W., 841.)
3. Neither the company nor Harrahan, as general manager, had any authority to confer a right of way over appellee's land. (*Mount Sterling & Jeff. Turnpike Co. v. Looney*, 1 Met., 550; *Enterprise Imp.*

Louisville & Nashville Railroad Co. v. Kentucky Midland Railroad Co.

Co. v. Wilson, 11 Ky. Law Rep., 4; Wheat v. Bank of Louisville, 9 Ky. Law Rep., 738; St. Louis Stock Yards v. Wiggins Ferry Co., 54 Am. Rep., 243; Angell & Ames on Corporations, p. 211, sec. 236; Garrison v. Combs, 7 J. J. M., 85.)

JOHN B. LINDSEY FOR APPELLEES.

1. Appellant was not under any such disability as should permit it to avoid its own contracts. (Boone on Real Property, sec. 390.)
2. The corporation can not avail itself of the defense of *ultra vires* where the contract has been in good faith fully performed by the other party or he has expended money in performance. (Beach on Law of Railways, secs. 498, 506, 518, 523, 530.)
3. It would be a fraud on appellee to permit the revocation or rescission of these contracts. (Bispham's Eq., p. 446, secs. 384-5.)
4. Appellee acquired by the contract the exclusive right to the use of the 197 feet of track in question. And even if it did not, appellant having permitted it to expend money knowing that it believed it had such exclusive right, is now estopped to assert the contrary. (Herman on Estoppel, 494, 496, 498; Boone's Law of Real Property, sec. 255.)
5. There can be no question as to the right acquired under this contract being an easement. (Boone on Real Property, sec. 135 and authorities cited.)
6. Licenses to a railroad to enter on land are not revocable after the licensee has expended money in making erections of a permanent character so that a revocation would operate as a fraud upon the licensee, and a court of equity will enforce the license as an agreement to give the right. (Beach on Law of Railroads, sec. 780; Jarvis v. Satterwhite, 2 Ky. Law Rep., 436; Porter v. Barclay, 7 Ky. Law Rep., 747; Alexander v. Woodford Spring Lake Fishing Co., 12 Ky. Law Rep., 107; McFarland v. Baugh, 12 Ky. Law Rep., 744; Holloway, &c., v. St. Louis, &c., R. Co., 13 Ky. Law Rep., 481; Griffy, &c., v. Bryans, &c., 7 Bush, 471.)

WM. LINDSAY OF COUNSEL ON SAME SIDE.**JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.**

Decision of this case depends upon meaning and application of the following contract: "Whereas The Kentucky Midland Railway Company wishes to form a connection of its main track with one of the side tracks of The Louisville & Nashville Railroad Company, near the warehouse east of High street and north of The Louisville & Nashville Railroad Company's main track in the

Louisville & Nashville Railroad Co. v. Kentucky Midland Railroad Co.

city of Frankfort . . as more particularly shown on the tracing made part hereof. And, whereas, The Louisville & Nashville Railroad Company has consented that the Kentucky Midland Railway Company made said proposed connection upon the terms and conditions set forth herein. Now, therefore, this contract, made and entered into this 9th day of November, 1888, witnesses that said The Louisville & Nashville Railroad Company hereby agrees that said The Kentucky Midland Railway Company may make said proposed connection, as shown by said attached tracing, with a single track railway, the said connection to be made under the supervision and to the satisfaction of an engineer, or the superintendent of The Louisville & Nashville Railroad Company and to be constructed and maintained by said The Kentucky Midland Railway Company, at its own expense, and free of all cost and expense to said The Louisville & Nashville Railroad Company. It is also agreed that, if at any time The Louisville & Nashville Railroad Company shall change the location of any of its tracks in said city of Frankfort, or shall lay any additional side track or side tracks or other tracks in said city, in such manner as will necessitate a change in the connection to be made under this contract, or in such manner as that the line of The Kentucky Midland Railway will be crossed or otherwise further connected therewith, that said The Kentucky Midland Railway Company will make such crossing or crossings, connection or connections, as may become necessary, at its own cost and expense exclusively, and that said The Louisville & Nashville Railroad Company is to be at no cost or expense whatever, growing out of said connection or connections, crossing or crossings, should such crossing or crossings,

Louisville & Nashville Railroad Co. v. Kentucky Midland Railroad Co.

connection or connections hereafter become necessary because of any change or changes said The Louisville & Nashville Railroad Company may make at that point."

The action was brought September 24, 1890, by The Kentucky Midland Railway Company and The Home Construction Company, the latter having, in 1888, leased of the former company its road and now operating it, to enjoin The Louisville & Nashville Railroad Company placing any of its cars upon that part of the main track of the plaintiff, Kentucky Midland Railway Company, between the northeast corner of South's warehouse, where it connects with one of defendant's side tracks, as shown by the paper made part of the contract, and the eastern line of defendant's freight yard, or in any manner whatever interfering with plaintiff's occupation and use of said track.

The Louisville & Nashville Railroad Company in its answer made a counter-claim, set up various grounds of defense and prayed said contract be adjudged of no legal effect, except as a temporary license revocable at its pleasure.

Upon final hearing the chancellor adjudged that The Kentucky Midland Railway Company and The Home Construction Company, as its lessee, are entitled to have, hold and maintain upon the freight yard of The Louisville & Nashville Company its main track of railway as now situated, from the eastern boundary of said freight yard along south margin thereof to the point of connection of same with one of the latter company's side tracks at northeast corner of South's warehouse, and have the right to operate, maintain and use said track, free from control, obstruction and interference of defendant; and,

Louisville & Nashville Railroad Co. v. Kentucky Midland Railroad Co.

moreover, are entitled in common with defendant to use of the switch track along side of said warehouse, from northeast corner thereof west to the point of its clearance from defendant's switch track, at a distance of about fifty feet, for passage of cars and trains in interchanging business between the two roads. And to protect such rights the defendant was perpetually enjoined placing any cars upon said track, between the northeast corner of said warehouse and boundary line of its freight yard against consent of plaintiffs or in any manner interfering with plaintiffs in their enjoyment, occupation and use of said track.

The effect of that judgment is to give to The Kentucky Midland Company absolute and exclusive possession and control of said track, extending about 197 feet, to be used and enjoyed by it, or its lessee, without right of The Louisville & Nashville Company, owner of the land on which it is situated, to place cars thereon, for any purpose whatever, without its consent.

It seems to us such construction and application of the contract in question is palpably variant from its true meaning and intention of the parties and is no less than arbitrarily taking, under form of judicial process, the property of one, and, without compensation, giving it to another. For it is too plain for discussion that The Kentucky Midland Company asked, and The Louisville & Nashville Company agreed to permit it, to extend its main track to a suitable point of juncture with a side track of the latter, for the sole purpose of forming a connection of their roads whereby to create and facilitate interchange of business. The Louisville & Nashville Company had no interest in such extension of The Kentucky Midland

Road for any other purpose, and it is unreasonable to say it intended to donate a portion of its freight yard, hardly large enough for its own purposes, for construction of a track which The Kentucky Midland would practically own and have right to operate, not for interchange of business between the two roads, but exclusively for its own private purposes. And one of the grounds of complaint by The Louisville & Nashville Company is, that after the contract was made, The Kentucky Midland Company constructed a side track from its own depot to a point of intersection with its main track, only about ten feet from the freight yard of the former company, and that in order to move trains from one of said tracks to the other, it is necessary to move them into the yard, which The Kentucky Midland Company, or its lessee, has, against the protest and to annoyance and inconvenience of The Louisville & Nashville Company, been doing and, under the judgment appealed from, may continue to do indefinitely.

Clearly, The Kentucky Midland Company has, under the contract, no right to use that part of its main track laid inside the freight yard of The Louisville & Nashville Company for any other purpose than the interchange of business between the two companies, nor right to place thereon or remove therefrom any cars except such as may be destined for, or brought from, The Louisville & Nashville Road.

It is equally clear to us that the writing in question, formally signed as it is by officers of both companies, does not import a mere license given without consideration and revocable at pleasure by The Louisville & Nashville Company. But it is, in substance and meaning, an

Louisville & Nashville Railroad Co. v. Kentucky Midland Railroad Co.

agreement whereby that company, in consideration of outlay of money by The Kentucky Midland Company in constructing the track of 197 feet, and further consideration of mutual and reciprocal benefit by reason of connecting their roads, sells and grants a joint and equal interest in that part of its freight yard occupied by the track in question, that is to be used by them for the purpose of interchanging freight and passengers and transfer of cars from one main track to the other; but not to be occupied or used by either, against consent of the other, for any other purpose.

It is however alleged, and, we think, shown, that in virtue of a verbal agreement, upon faith of which The Kentucky Midland Company paid for removing and repairing that part of the switch track alongside of said warehouse, the two companies were to have joint use of it for passage of cars from one main track to the other. It would seem, independent of an express agreement, that use of that part of the switch track would be necessary, in order to facilitate the purpose for which the track of 197 feet was constructed, and a right to reasonable use would be a result of the contract, and there was no necessity to fix, by judgment, the right to such use.

For the reasons indicated, the judgment is reversed and cause remanded for dissolution of the injunction, except to the extent it restrains The Louisville & Nashville Company from obstructing use of the track of 197 feet for interchange of business between the two companies, and for further proceedings consistent with this opinion.

Hedger, &c., v. Judy, &c.

CASE 94—PETITION EQUITY—MAY 12.

Hedger, &c., v. Judy, &c.

APPEAL FROM GRANT CIRCUIT COURT.

DEVISE OF LAND WITH LIEN UPON IT.—Where a testator devised land to his two brothers, executors of the will, reciting that it was for the love and affection he had for them and also for their services in settling up the estate, there being a lien on the land, which, if discharged out of the estate, would leave nothing with which to pay legacies, a fact that must have been known to the testator, it necessarily follows that the testator intended the brothers to take the land *cum onere* and to release it from the existing lien with their own means and not by using assets of the estate.

H. CLAY WHITE FOR APPELLANTS.

The debt owing to the estate of J. C. Hedger, deceased, for the purchase money lien on the three hundred acres of land is to be treated as any other debt owing by the testator, and the personal estate of the testator must first be applied to its payment. (*Broadwell v. Broadwell*, 4 Met., 291; *Augustus v. Seabolt*, 3 Met., 159; *Jackson v. Payne*, 2 Met., 567; *Allen v. Vanmeter*, 1 Met., 277; *McCampbell v. McCampbell*, 5 Litt., 92; *Moore v. Howe*, 4 Mon., 221; *Petty's Heirs v. Montague*, 7 B. M., 55; *Moore v. Moore*, 12 B. M., 656; *Cromie v. L. O. H. Society*, 3 Bush, 379; *Caldwell v. Kinkead*, 1 B. M., 280; *Lilly v. Curry*, 6 Bush, 592; *Alexander v. Waller*, 6 Bush, 341; *Moran v. Dillihay*, 8 Bush, 437; *Shelly v. Shelly*, 1 B. M., 269; *Smith v. Lampton*, 8 Dana, 71; *Lupton, &c., v. Lupton, &c.*, *Johnson's Chy Rep.*, vol. 1 and 2, p. 614; 2 *Redfield on Wills*, pp. 132, 136, 207, 208, 209.)

COLLINS AND FENLEY ON SAME SIDE.

1. The devisees do not take the land devised, charged with the lien upon it, in the absence of such a charge in the will. The lien debt stands upon the same footing as any other debt due by the testator.
As to rules for construction of wills, see *Jackson v. Payne's Ex'ors*, 2 Met., 570; *Augustus, &c., v. Seabolt, &c.*, 3 Met., 159; *Cromie's Heirs v. Louisville Orphans' Home Society*, 3 Bush; *Caldwell's Ex'ors v. Kinkead, &c.*, 1 B. M., 229.
2. Clause 1 creates a special devise to appellants, for it devises the thing itself, the three hundred acres of land. (*Broadwell v. Broadwell*, 4 Met., 291; *Smith v. Lampton*, 8 Dana, 71; *Redfield on Wills*, chap. 7, p. 132; *Williams on Ex'ors*, vol. 2, p. 992.)

Hedger, &c., v. Judy, &c.

But the devise to Reuben Hedger, John A. Judy and Margaret Judy and the residuary devise to Reuben Hedger are each and all general legacies. (Redfield on Wills, secs. 6, 7 and 8, pp. 135-6.)

3. The specific devise of the three hundred acres can not be made to contribute to make up an unexpected deficiency which may arise in regard to other devises, nor can specific devises have any deficiency made up to them. (Redfield on Wills, sec. 9, p. 136; Davenport v. Seargeon, 61 N. H., 25 Am. Law Reg., 480; Emery v. Bachelor, 78 Maine, 25 Am. Law Reg., 680; Gen. Stats., chap. 39, art. 2, sec. 19; McCamble v. McCamble, 5 Litt., 92; Alexander v. Waller, 6 Bush, 341.)
4. The statute provides how the debts are to be paid in the absence of directions in the will. But here the will specifically declares out of what property the debts are to be paid and must control. The will not only declares that the debts shall be paid by a sale of the land and the personal estate, but as distinctly declares that the devise to the appellees and the residuary devise to Reuben Hedger shall also be paid out of the same fund.

W. W. DICKERSON AND JAMES T. WILLIS FOR APPELLEE.

The court must presume that the testator knew with reasonable certainty the amount of his assets and liabilities and therefore must hold that it was his intention to make the lien debt a charge upon the land devised to the executors, as to hold otherwise would be to ascribe to him a nugatory act in making the legacies to his infant son, his sister and nephew. (Cameron v. Boyd, 4 Dana, 550; 2 Redfield on Wills, pp. 207, 208, 209.)

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

Sandford Hedger, by will dated July 16, 1884, and probated August 11, 1884, devised to his brothers, *Johnathan* and James Hedger, his farm, containing about three hundred acres of land, also jointly with his sister, Margaret Judy, all household and kitchen furniture; to Margaret Judy, \$1,000; to his nephew, John Judy, \$1,000; to Reuben Hedger, an illegitimate child, then an infant, \$1,000, to be paid to him upon becoming twenty-four years of age. Also, in language of the testator, "all of the remainder of my estate that may be left after the payment of my funeral expenses, expense of settlement of my estate and all of my debts and the devise to Reuben

Hedger, John Judy and Margaret Judy to be paid to him as provided in the third clause of this will; and my executors are directed and requested to expend \$500 in educating my son, Reuben Hedger." But it is in the same clause provided that if he should die before the age of twenty-four, leaving no lawful child surviving him, all the money devised to go to *Johnethan* and James Hedger.

Johnethan and James Hedger were appointed executors of the will and directed to have testator's estate settled up within six years.

But February 11, 1891, John Judy brought this action against James Hedger, surviving executor. *Johnethan* Hedger having died in 1885, for settlement of the estate, none having been made, though more than six years had elapsed since they qualified as executors, and to recover amount devised to him, no part of which, nor of devises to Reuben Hedger and Margaret Judy, had then been paid.

The special commissioner to whom the case was referred for auditing and settling the accounts and transactions of the surviving executor, reported he had paid debts in excess of assets of the estate, the sum of about \$574. And as a consequence there was left in his hands no means with which to pay any part of the legacies. But by the judgment appealed from by the executor exceptions to the commissioner's report were sustained and credits allowed thereby to the executor were rejected to an aggregate amount sufficient to satisfy the legacies and leave a residuum for Reuben Hedger.

The first of those exceptions is to a credit of \$283.95 allowed the executor on account of a personal judgment

Hedger, &c., v. Judy, &c.

in favor of one Hartfield against *Johnethan* Hedger, which James Hedger alleges he paid as executor upon proof, not at all sufficient to show the estate of Sanford Hedger was liable therefor.

The second is to a credit of \$1,312, being one third of a judgment rendered in an action to settle the estate of Jacob C. Hedger in favor of legatees against James Hedger, surviving executor of his will, *Johnethan* and Sanford Hedger, the other executors, being then dead. The judgment was rendered in 1888 for amount of the estate of Jacob C. Hedger, found in the hands of James Hedger four years after death of Sanford Hedger. And without competent evidence showing, satisfactorily, Sanford Hedger had, prior to his death, received as executor any part of the estate of his deceased father not accounted for, or was at time of his death in default in any respect, the special commissioner in this case allowed to James Hedger credit for one-third of that judgment, though it was rendered against him alone. But the lower court rejected the claim only to the extent of \$749.67, and as there is no cross-appeal, that ruling will have to stand.

The third exception involves construction of the will, particularly clause 1, as follows: "I give and devise to my brothers, *Johnethan* Hedger and James Hedger, my farm upon which I now reside, containing about three hundred acres of land, being the same tract purchased by me from my father, Jacob C. Hedger, deceased. And this devise is made to them for the love and affection I have to them and for their services in settling up my estate. And they, upon accepting the devise, are to make no charge for their services as my

executors for settling my estate, and no allowance is to be made to them by the court therefor."

At date of the will and death of the testator there was unpaid purchase money, for which a lien on the land devised existed, to the amount of about \$4,001. And the question presented for determination is whether the testator intended the devisees, *Johnethan* and James Hedger, to pay that sum out of their own means, or with assets of his estate.

The testator in clause 7 authorized his executors to sell all his lands, except the tract devised to them, to pay his debts, permitting them, however, to retain one of the tracts designated at the price of \$1,400, which they did do. He also directed his personal property sold, proceeds of which were evidently intended to pay debts and legacies. And nothing to the contrary appearing a reasonable inference would be that the amount of unpaid purchase price of the land devised to them was regarded by him as one of his debts intended to be thus paid. But it seems to us, looking to the general tenor and purpose of the will, and giving effect to each part so as to make the whole instrument consistent and reasonable, the conclusion necessarily follows that he intended his two brothers, *Johnethan* and James Hedger, to take the farm devised to them *cum onere* and to release it from the existing lien with their own means and not by using assets of the estate.

The estate left by him was not so large, precarious or complicated as to make it at all difficult for him to ascertain and fix approximately its value after deducting amount of indebtedness, which was also easily estimated. And that he was well acquainted with character, condition and

Hedger, &c., v. Judy, &c.

value of his estate and each part of it is shown by the intelligent, careful and precise manner in which he disposed of it, the will containing thirteen clauses relating to different subjects, each one of which was considered minutely and methodically. Then knowing, as we are satisfied the testator did, that to charge his estate with payment of the balance of purchase money of the farm would result in gift of his whole estate, about \$8,000 in value, to his two brothers, *Johnethan* and James Hedger, and render nugatory all provisions for the other three devisees, it is unreasonable to suppose he intended to so charge it. It is made apparent from the will, he had strong affection for his illegitimate son, Reuben, who, at date of it, was only about six years old, and was extremely solicitous for his welfare. For, as stated in the will, he had taken the child to his own home to raise and educate, and, in anticipation of his own death, not only gave him \$1,000, and the residuum of his estate, but directed \$500 to be used by the executors in educating him, and appointed one of them his guardian to care for and protect him.

To say that notwithstanding the anxious desire thus shown for the welfare and support of his helpless child, he expected and intended all provisions of his will in regard to him to become nugatory, would be unreasonable. In our opinion the testator intended each clause of his will to take effect and be carried out, and therefore did not desire or expect his estate to be charged with payment of any part of the purchase money of said farm, which would inevitably result in defeating that intention and depriving three of the devisees of their legacies.

Judgment affirmed.

Hardwick v. Kean, Receiver.

CASE 95—PETITION ORDINARY—MAY 15.

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Hardwick v. Kean, Receiver.

APPEAL FROM POWELL COURT OF COMMON PLEAS.

1. THE STATUTE OF THE UNITED STATES AS TO THE REMOVAL OF CAUSES FROM STATE COURTS to the Circuit Court of the United States does not in terms require any other proof of a fact stated as a cause for removal than affidavit of the party applying or his attorney. In this case, however, no question can arise about sufficiency of the proof, because the statement of the essential fact in the petition for removal not being controverted was properly accepted by the court as true.
2. SAME—AMENDED PETITION.—The defendant, having filed his petition for removal at the proper time, had the right, before plaintiff had taken any other step in the case, to file an amended petition setting up an additional cause for removal.
3. SAME—A SUIT AGAINST A RECEIVER OF A RAILROAD COMPANY, appointed by judgment of the Circuit Court of the United States, to recover damages resulting from alleged improper construction and operation of the road upon plaintiff's land, is a suit "arising under the Constitution and laws of the United States" and subject to removal from a State court to Circuit Court of the United States.

C. B. HANCOCK AND HAGGARD, BENTON & SPENCER FOR APPELLANT.

1. An order transferring a case from a State to a Federal court is a final order from which an appeal lies. (*Mercer & Co. v. Glass' Ex'or*, 89 Ky., 199; *Hall & Long v. Ricketts*, 9 Bush, 370; *Akerley v. Vilas*, 24 Wis., 165.)
2. To effect a removal, there must be some proof of citizenship in another State. The mere assertion of the party seeking the removal is not sufficient. (*Eastin v. Rucker*, 1 J. J. Mar., 332.)

As the petition for removal is verified only by attorney, which is not authorized by law, the pleading amounts to nothing more than the mere verbal assertion of the attorney that appellee is a citizen of New Jersey.
3. This cause does not come within the act of Congress providing for the removal of cases when the controversy is between citizens of different States. The receiver is not only not the representative of either party to the action, but his possession and control are, in a measure, hostile to the claims of all parties. (*Bishop's Equity*, p. 606; 3 *Pomeroy's Equity*, sec. 1330; *High on Receivers*, secs. 1, 239; *Booth v. Clark*, 17 How., 322.)

Hardwick v. Kean, Receiver.

4. There is no authority for the filing of an amended petition for removal.
5. The record shows that this suit is not one "which arises under the Constitution and laws of the United States."

HUMPHREY & DAVIE AND ARTHUR CAREY FOR APPELLEE.

1. The fact that appellee was a citizen of another State, entitled him to a removal of the cause, although the action was against him as a fiduciary. (*Rice v. Houston*, 13 Wall., 66-68.)
2. The action against appellee as receiver under appointment by the United States Court brings the case within the statutory requirements for removal of cases arising under the Constitution and laws of the United States. (Gen. Stats. (Ky.), p. 44a-44d, Texas, &c., *R. Co. v. Ida May Cox*, 145 U. S., 593.)
3. A State court can not inquire into the truth of the allegations of a petition for removal of a cause to the United States Court. It must determine the question upon the sufficiency of the petition and bond. (*Kansas City, &c., R. Co. v. Daughtry*, 188 U. S., 298)

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

This is an action instituted in Powell Circuit Court by J. R. Hardwick against Hamilton F. Kean, receiver of the Kentucky Union Railway Company, to recover damages resulting from alleged improper construction and operation of the road upon plaintiff's land.

At the time fixed by the Civil Code for defendant to answer, he filed his petition for removal of the cause from Powell Circuit Court to Circuit Court of the United States for the district of Kentucky, upon the ground he was and is a citizen of the State of New Jersey. And in an amended petition, filed same day, it was stated, as an additional ground for removal, that the action is one which arises under the Constitution and laws of the United States.

2. The bond required in such case having been filed, the lower court made an order for removal as applied for by defendant. Counsel urge as objection to the order that the cause for removal, stated in the original petition, was

Hardwick v. Kean, Receiver.

not proved, and that it was error to permit the amended petition to be filed at all. The fact relied on was stated in the petition, verified by defendant's attorney as authorized by section 117, Civil Code, to be done in case the party be absent from the county.

The statute of the United States on that subject does not, in terms, require any other or further proof of a fact stated as a cause for removal of an action from a State court to Circuit Court of the United States than affidavit of the party applying, or his attorney. In this case, however, no question can arise about sufficiency of the proof, because the statement of the essential fact in the petition for removal not being controverted, was properly accepted by the court as true.

We do not see why defendant could not file his amended petition, as was done, before plaintiff had interposed any other pleading or taken any other steps in the case than to simply file his petition. And as it would have, anyhow, been in discretion of the court to permit the amended pleading filed at the time it was done, it was not error to treat it as properly filed.

It appears from the record that defendant was appointed receiver by judgment of the Circuit Court of the United States, and, therefore, as held by the Supreme Court, such action against him as this is in meaning of section 2, article 3, Constitution of United States, a suit "arising under the Constitution and laws of the United States," and subject to removal from a State court to Circuit Court of the United States. (Buck v. Colbath, 3 Wall., 334; Feibelman v. Packard, 109 U. S., 421; Rock v. Perkins, 139 U. S., 628; Texas & Pacific R. Co. v. Cox, 145 U. S., 593.)

Gray v. Cornwall's Assignee.

In our opinion, without deciding whether sufficient cause for removal was stated in original petition, there was, according to the cases cited, unquestionably sufficient cause in the amended petition, and the lower court had no other alternative but to transfer the case.

Judgment affirmed.

CASE 96—PETITION EQUITY—MAY 17.

Gray v. Cornwall's Assignee.

APPEAL FROM JEFFERSON CIRCUIT, CHANCERY DIVISION.

1. **IMPROVEMENTS ERECTED BY LESSEE TO BE PURCHASED BY LESSOR AT EXPIRATION OF LEASE—EQUITABLE LIEN.**—Where there was a lease of a city lot for a term of ten years, the lessee to erect a building, which at the expiration of the lease was to be valued by referees, and upon the payment of that valuation to the lessee the premises were to be delivered to the lessors, with the further provision that if the lessors should not be able to purchase or find a purchaser, "then it is agreed that the lease shall be continued and extended for the same terms as agreed on for the ten years until such time as they be enabled to purchase at valuation in mode just mentioned, or until some other mutual agreement or settlement shall be made," the lease created an enforceable obligation on the part of the lessors to pay for the improvements and not a mere privilege to do so; and while the clause of the lease continuing its terms after the expiration of the first ten years was intended to give ample time to the lessors to make payment, that time must have some limit, and more than twenty-five years having elapsed without any arbitration or agreement as to the value of the improvements, the lessee, or his assignee, is entitled to enforce his equitable lien for the value of the improvements.
2. **SAME.**—The lessee having purchased from the lessors a one-half interest in the property, he owns the property jointly with the appellant, who has purchased from the lessors the other half, which he holds subject to the lessee's lien for one-half the value of the improvements; and as each owner has a vested estate in possession and the property is indivisible, the lessee, or his assignee, has the right to have the property sold under section 490 of the Civil Code, and incidentally to make ap-

Gray v. Cornwall's Assignee.

pellant satisfy his equitable lien for one-half the value of the improvements. But even if the fee is in the lessee to one-half the lot and all the buildings, the appellant owning one-half the ground alone, it can make no difference, the result being the same.

3. **BUILDINGS PART OF REALTY.**—The buildings, which are substantial five-story brick structures, are to be regarded as a part of the realty. But whether they are personal or real estate is immaterial, the chancellor in either case having jurisdiction to order the sale.
4. **THE EQUITABLE MODE OF ARRIVING AT THE VALUE OF THE IMPROVEMENTS** is to take their value relative to that of the lot upon which they stand.
5. **LIEN FOR IMPROVEMENTS—SALE ORDERED BEFORE FIXING VALUE.**—It being evident that a sale must be made in any event, it was not error to order a sale before ascertaining the value of the improvements. The chancellor, when he has the fund in his hands, hearing proof as to the character and condition of the buildings at the date of the sale, will be better able to fix a just basis of value.

PIRTLE, SPEED & TRABUE FOR APPELLANT.

Brief withdrawn.

P. B. MUIR OF COUNSEL FOR APPELLEE.

1. The right of renewal in a lease entitles the lessee to only *one renewal*. Otherwise it may lead to a perpetuity, and this would be illegal, or, in this case, continue during the pleasure of Gray and his heirs and descendants forever. (*Morrison v. Rossignol*, 5 Cal., 164; *Cunningham v. Pattee*, 29 Mass., 248.)
2. The improvements became a part of the freehold, and therefore the property of the owner of the fee as soon as made, and Gray, being the owner in fee of an undivided half of the land, is of necessity the owner of one-half the improvements thereon, subject, of course, to a lien for one-half the value of those improvements. (*Conover v. Smith*, 17 N. J. Eq., 51; *Van Rensselaer v. Penniman*, 6 Wend., 569; *Cutter v. Smith*, 2 Wall., 831.)
3. But whether the improvements are part of the freehold or not, a sale must be had under section 490 of the Civil Code. For the improvements were placed there by contract between the parties under whom both appellant and appellee claim, and were, therefore, properly placed there. They are all brick and can not be removed.
To give the right to a sale under section 490, it is sufficient that each of the parties can be fully indemnified and protected in a distribution of the proceeds of sale, and that an equal partition can not be made of the property in kind. (*Malone v. Conn. &c.*, 15 Ky. Law Rep., 421.)
4. Appellant's contention that section 490 of the Civil Code is unconsti-

Gray v. Cornwall's Assignee.

tutional as to persons *sui juris* must fail. (Kean v. Tilford, 81 Ky., 600; Gossom v. McFerran, 79 Ky., 238; Kneas' Appeal, 31 Pa. St., 87.)

Cases explained: Syms, &c., v. Mayor of New York, 105 N. Y., 157; Ervine's Appeal, 16 Pa. St., 256; Palaret's Appeal, 67 Pa. St., 480)

5. To constitute a "covenant" to pay for the improvements no set form of words is necessary. It is only necessary for the lease to show that such was the *intention* of the parties. (Taylor's Landlord and Tenant, vol. 1, p. 296, note 1; *Idem*, secs. 246, 247.)

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

The judgment below directed the sale of certain real estate situated on the northwest corner of Main and Seventh streets, in the city of Louisville.

The proceeding was had under section 490 of the Civil Code, that authorizes "a vested estate in real property, jointly owned by two or more persons, to be sold by order of a court of equity, where the estate is in possession and the property can not be divided without materially impairing its value, or the value of the plaintiff's interest therein."

In or about the year 1865, the then owners in fee of this realty leased it to a man by the name of Thomas Slevin, and so much of the lease as applies to the point raised by counsel for the appellant is as follows:

"This indenture, made and entered into this 11th day of August, 1865, by and between John Martin, trustee for Nancy B. Martin and children, said Nancy B., John S. Martin, and Mary A., his wife, James Martin, John P. Maher and wife, Mary Mc. (*nec* Martin) of the first part and Thos. Slevin of the second part, Witnesseth that the parties of the first part hereby lease unto the party of the second part for the term of ten years, from the first day of April, 1866, the following described parcel of ground in the city of Louisville: beginning at the northwest

corner of Main and Seventh streets, running westwardly and fronting fifty-three feet on Main street, thence at right angles northwardly one hundred and five feet, thence at right angles eastwardly fifty-three feet to Seventh street, thence southwardly with Seventh street to the beginning; on these terms, namely, the two store-rooms now on said ground, occupying about forty-two feet front (equal width back), belonging to said Slevin, survivor of T. E. Slevin, to be let by him to suitable tenants, he defraying the expense of keeping them in usual tenantable condition, and out of the rent received for them he is first to pay all taxes, city, State, etc., and repairs for streets, and to divide the remainder, as it becomes due and is collected by him, into equal halves, he to retain one-half and to pay the other half to said parties of the first part; he agrees to pay at the rate of three hundred dollars per year for the 10 feet $7\frac{1}{2}$ inches, more or less, unimproved ground, being the western part of said parcel, up to such time as he shall build thereon, after which he is to let such improvements, and after paying taxes, etc., divide the net income half and half precisely in same manner as agreed on regarding the two houses named.

“At the expiration of the lease the parties of the first part shall choose a referee, the party of the second part shall choose one also, and these two, when chosen, shall choose a third, who shall value the whole of the improvements on said ground, and upon the payment of said valuation to the said party of the second part, or to his heirs or assignee, the said premises with said improvements shall be delivered into the possession of the parties of the first part. If, however, the parties of the first part shall not be able to purchase or find a purchaser, then it

is agreed that the lease shall be continued and extended for the same terms as agreed on for the ten years, until such time as they be enabled to purchase at valuation in mode just mentioned, or until some other mutual agreement or settlement shall be made."

As will be seen from this lease, it began in April, 1866, and was to run for ten years, at the expiration of which time Slevin was to have pay for the improvements, or *rather their value*, and the lessors (the Martins) were to take possession of the premises. A referee was to be selected by the parties to fix the value, "and if the Martins should be unable to pay for the improvements, or to find a purchaser, then the lease was to be extended and continued for the same terms agreed on for the ten years until such time as they (the Martins) may be enabled to purchase at valuation in mode just mentioned, or until some other mutual agreement or settlement shall be made."

When the lease was executed, a part of the lot of ground had upon it two storehouses, fronting on Main street, and that part of the ground on which no building stood has been or was improved by Slevin, as authorized by the lease, by the erection of a building upon it; so the entire lot is covered by these buildings, and, as suggested by counsel, the buildings standing on the lot when the lease was executed were evidently built by Slevin, as the lessors agreed, by the terms of the lease, to pay for these improvements. Slevin, under the lease, was to rent the property, and after paying all taxes, street improvements, etc., the net proceeds of the rental to be divided between the lessors and the lessee. No settlement or agreement as to the value of the improvements made

Gray v. Cornwall's Assignee.

by Slevin was ever had between himself and the Martins, and the property has been used and occupied by tenants for nearly twenty-six years and to the date of these proceedings, without any settlement by reference to arbitration or otherwise as to the improvements, but the rents apportioned between the Martins, or their vendees, as the terms of the lease required.

Wm. Cornwall, who owned in fee one undivided half of this lot of ground and all the buildings on the entire realty, made an assignment of his estate to the appellee, the Louisville Trust Company. The assignee, under the assignment, became entitled for creditors to one-half the lot of ground and to the value of the three buildings placed upon the ground by Slevin. The appellant, J. S. Gray, obtained by purchase the fee to the other undivided half of the lot. The title that each asserts is not controverted; so we find, when this action was instituted, that the appellee was entitled to the value of all the improvements and the fee to one undivided half of the ground, and the appellant, the fee to the one-half the ground only. It is conceded the property with the buildings upon it is indivisible, and that, in fact, no division can be made, and a resort has been had to the relief given in such cases by section 490 of the Civil Code. With the buildings off the lot, a division doubtless could be had, but it was never intended that these buildings should be detached from the ground, but, on the contrary, it was designed the buildings should form a part of the realty and pass to the original lessors upon the payment of their value.

The buildings are substantial brick structures, five stories high, and Slevin, under the lease from the Martins, had an equitable lien for the value of his improvements

Gray v. Cornwall's Assignee.

at the termination of the lease, and could have held possession until he was paid. Both the appellee and the appellant had actual knowledge of the lease and its terms and the manner of the holding by the original lessee, Slevin. Cornwall's assignee stands in the shoes of Slevin and is entitled to all the equities that Slevin had.

The appellant, Gray, disclaims to own any part of the improvements, and, in fact, some of his deeds under which he holds confines in express terms in the grant his title to the ground and not to the buildings, and as to the extent of his interest there seems to be no controversy.

It is alleged, and we must assume the testimony shows (the depositions not being before us), a refusal by the appellant to refer the question of value to a referee, or to make any settlement in regard to the improvements, and that neither the Martins, nor any one for them, have complied with this provision of the lease. The buildings constitute a part of this realty, and the realty is held in fee by the appellant and the appellee. The appellant holds his half subject to the equitable lien for the improvements. The assignee of Cornwall is required to sell his interest for creditors. He has a vested estate in possession with a lien for the improvements. The appellant has a vested estate in fee to the one-half, subject to the lien for the one-half value of the improvements. There is no reversion or remainder interest. The parties own the property jointly, one having a less interest than the other; or rather the appellee has a lien on the appellant's one-half which he may enforce. They have the possession, each receiving rents under the terms of the original lease. If the fee is in the appellee to the one-half of the lot and all the buildings, and the appellant the owner of one-half the

Gray v. Cornwall's Assignee.

ground only, it can make no difference. It is a vested estate in both, in possession, and indivisible. Can it be said that the appellant can retain his fee to the one-half the ground, receive rents, and demand that the lease shall continue forever, or the buildings removed from the premises? It is contended it was a mere privilege on the part of the lessor to pay for these improvements, with no obligation to do so that could be enforced in law or equity, and that all the relief the appellee is entitled to as against the appellant, or the Martins, is to remain in possession so long as the lessors fail to pay for the improvements, or until some mutual agreement for settlement is entered into between the parties. We do not so construe the contract. It should have a reasonable construction, and the clause of the lease containing its terms, after the expiration of the first ten years, was to give ample time to the lessors to make payment. This time must have some limit—that which is reasonable and contemplated by the parties—and the period of twenty-five years was certainly time enough to have enabled these parties to comply with their obligation.

The sale of this interest by the assignee with a cloud upon the title and the assertion of a perpetual lease by the appellant, would result in a sacrifice of the property, and no such judgment should be rendered.

There is no constitutional impediment to this sale as ordered or to the proceedings directing it. It orders a sale of realty that is indivisible and incidentally makes the vendee of Martin satisfy this equitable lien, and whether the buildings are personal or real estate is immaterial. We are satisfied, however, they constitute a part of the realty, were erected for that purpose and that the

appellant owns one-half the ground and buildings, subject to the lien. In *Kutter v. Smith*, 2 Wall., 499, the Supreme Court, through Mr. Justice Miller, in speaking of the legal title to the building as distinct from the lot, said : "The well-settled rule is that such erections as this become a part of the land as each stone and brick are added to the structure." Here are five-story brick buildings attached to and upon this ground, and they must be treated as a part of the realty on which they stand. The title is, or was, originally in the lessors, subject to the lien of Slevin, but if you make the title to the building distinct from the ground it avails nothing for the appellant, as in either case the chancellor has the jurisdiction to sell it.

It is argued the judgment below should have first ascertained the value of the improvements before ordering a sale of the whole estate. We do not think this would be equitable or just to the appellant. He may be, as is contended, unable to pay for the improvements, and if their value should be ascertained regardless of their relative value to the ground upon which they stand, there might be danger of the appellant losing his fee if then sold to satisfy the value of the buildings.

The sale is ordered, as we understand, with a reservation on the part of the chancellor of determining in what manner the proceeds of sale should be apportioned. The relative value of the buildings to that of the lot upon which they stand would, in our opinion, be the equitable mode of adjustment. The Martins have no longer any interest in this property. The title is in the appellee, as assignee, and in the appellant. They are each required to discharge one-half the lien for the improvements. The entire property is sold and the chancellor is called upon

to apportion the proceeds between the two vendees. It would be inequitable to take from either his fee to pay for his improvements, and the chancellor will doubtless be careful to protect all parties in interest in his apportionment. When you estimate the net rental value of the entire property and capitalize it at say 5 per cent, the result being the entire value, and then fix a value on the realty, and the difference between the value of the land and that of the whole being the value of the improvements, may, in some cases, be the proper mode of adjustment, and yet the location of the property will often be such as to cause a high rental value on a very indifferent building.

The chancellor, when he has the funds in his hands, hearing proof as to the character and condition of the buildings *at the date* of the sale, will be better able to fix a just basis of value than to fix the value of the improvements before the sale, and it being evident that a sale must be made in any event, we perceive no reason for anticipating the danger apprehended by counsel of a sale before the value of the improvements is ascertained.

The judgment below is affirmed.

Jones v. Louisville & Nashville Railroad Company.

CASE 97—PETITION ORDINARY—MAY 17.

Jones v. Louisville & Nashville Railroad
Company.

APPEAL FROM HARDIN CIRCUIT COURT.

MASTER AND SERVANT—FAILURE TO INSTRUCT INEXPERIENCED SERVANT.—Where a servant has actually operated and seen others operate an implement or machine often enough to enable him by the exercise of ordinary intelligence and care to learn how to avoid being injured by it, or where the mode of operating it is so simple as that a person of ordinary intelligence or care can at once perceive the safe and proper mode of operating it, there is no duty resting upon the master to instruct him.

Where a section-hand on a railroad while engaged, under the direction of the section-boss, in operating a hand-car stooped down to throw aside some loose tools on the floor of the car, and in doing so "lost the motion of the lever" and was thrown off the car and injured, the company was not liable on account of the failure of the section-boss to instruct him or to warn him of the danger, for while he had worked on the road only a few days, and had never before operated a hand-car, yet he had seen others do so, and must have known that it was dangerous "to lose the motion of the lever." And even if the section-boss was negligent in permitting the tools to be placed loose on the floor of the car, it does not appear that that negligence was the proximate cause of the injury to plaintiff, there being nothing to show that there was a reasonable probability of his being injured by the tools, and even if it had been necessary for them to be put aside he might have had the car stopped for the purpose.

J. P. HOBSON FOR APPELLANT.

1. The evidence shows that appellant had been a farm laborer, and when he began to work for appellee, told the foreman that he knew nothing of the business and that he would have to instruct him, which he agreed to do. Notwithstanding this, he placed this inexperienced young man at the front end of the hand-car, a place of great danger for an inexperienced man, and gave him no instruction as to the danger or how to perform safely his duties. The danger was of a character not to be realized by an inexperienced man without warning, and by reason of plaintiff's ignorance of it he was knocked off the hand-car and received the injuries complained of. That in such a case he is entitled to remedy, the authorities are clear. (Parkhurst v. Johnson,

Jones v. Louisville & Nashville Railroad Company.

50 Mich., 70; s. c., 45 Am. Rep., 28; Smith v. Peninsular Car Works, 60 Mich., 501; s. c., 1 Am. St. Rep., 542; Sullivan v. India Mfg. Co., 113 Mass., 396; Jones v. Florence Mining Co., 66 Wis., 268; s. c., 57 Am. Rep., 269; Bishop on Non-Contract Law, sec. 651; Shearman & Redfield on Negligence, sec. 201.)

2. The court erred in giving a peremptory instruction. The evidence was sufficient to authorize the submission to the jury of the question of negligence. (1 Shearman & Redfield on Negligence, sec. 114 and notes; Eskridge's Ex'ors v. Cincinnati, &c., R. Co., 89 Ky., 372; Fightmaster v. Beasley, 7 J. J. M., 412; Rowland v. Hanna, 2 B. M., 131; Shakers v. Underwood, 9 Bush, 609; Louisville, &c., R. Co. v. Goetz's Adm'r, 79 Ky., 445; Railroad Co. v. Street, 17 Wall., 657.)

W. H. MARRIOTT FOR APPELLEES.

1. There was no negligence on the part of the section-boss in placing the tools on the floor of the car. But even if he was negligent in that regard the company would not be liable, because in the performance of such duties as picking up the tools and putting them on the car he is a fellow-servant with the other section-hands. (Justice v. Penn. Co., 6 Am. Railroad and Corp. Rep., 56; Schaub v. Hannibal, &c., R. Co., 106 Mo., 74; s. c., 16 S. W. Rep., 927.)
2. There was no negligence in placing plaintiff in front of the hand-car, as the evidence shows there is no more danger in riding on the front of a hand-car than behind, except that if you were to fall off in front the hand-car would run over you and if you were to fall off behind it would not. And to say that the section-boss should have warned plaintiff that it would be dangerous to do the thing he did do would be not only unreasonable but preposterous.

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

Appellant having, while engaged as an employe of appellee in operating a hand-car, been knocked from and run over by it, brought this action to recover for personal injury then received, which he states resulted from gross negligence of the section-boss, to whose orders he was at the time subject.

The alleged negligence consisted in the section-boss placing appellant at front end of the hand-car, the most dangerous position, for the purpose of working one of the levers, without informing him of the peculiar danger to which he was thereby exposed or instructing him how to

Jones v. Louisville & Nashville Railroad Company.

avoid it, although he had been employed only a few days as a section-hand and was unacquainted with the business of running hand-cars; and in the section-boss placing or permitting to be placed loose upon the floor of the car, working-tools, in the effort to avoid contact with which, while working the lever, appellant was struck by the lever and knocked from the hand-car and received the injury referred to.

As the lower court, at conclusion of the evidence in behalf of plaintiff, instructed the jury to find for defendant, which was done, the only question for us to consider is whether that action of the court was proper.

It appears that appellant was employed as a section-hand by the section-boss in behalf of appellee, and commenced work on Monday, and received the injury complained of the following Saturday; that each day during that period he, with his co-laborers, under control of the section-boss, was engaged in the work he was employed to do, which required the hand-car to be moved from place to place, and in moving which appellant, like other hands, took part. But he had never been before so employed, and of course was inexperienced and unskillful, being by occupation a day laborer of ordinary intelligence and capacity.

On the day he was injured, the hands, accompanied by the section-boss, had gone some distance from the station-house for the purpose of repairing the railroad, taking the hand-car with them; and the manner in which appellant was injured is thus stated by him as a witness: "When we started from where we did that work that morning, the tools were just throwed upon the car, and there was what they called the spike-maul hammer was jostling

down as the car was running, and it got down near my feet, and I got a little afraid of the handle and just stooped then to throw the hammer aside on the car further, and I lost the motion of the lever, I suppose, or something, anyhow the lever struck me, as I raised up, in my breast here, and pitched me off backwards on the road."

"Accepting that statement as true, which must be done in determining whether the lower court was authorized to take the case from the jury, the inquiry is, first, whether appellee, by its servant, the section-boss, was guilty of culpable negligence that was the proximate cause of appellant being knocked from the hand-car and injured? Second, if so, whether but for the concurring or co-operating fault of appellant the injury would not have occurred; that is, might the injury have been avoided by the exercise of ordinary care on his part?

No doubt, as counsel contends "it is the duty of the master to give such warning to the servant of all defects or hazards incident to the occupation of which the master knows or ought to know, and such information as may be warranted by ignorance, inexperience or want of capacity of the servant and the dangerous nature of the employment." But when a servant has actually operated, and seen others operate, an implement or machine often enough to enable him, by the exercise of ordinary intelligence and care, to learn how to avoid being injured by it, or when the mode of operating it is so simple as that a person of ordinary intelligence or care can at once perceive the safe and proper mode of operating it, there is no duty resting on the master to instruct him. No person who has once worked the lever of a moving hand-car, or seen another do it, need be informed that it is dangerous,

Jones v. Louisville & Nashville Railroad Company.

in the expressive language of appellant himself, *to lose the motion of the lever.*

Whether it was negligence in the section-boss to place or permit the tools to be placed upon the floor of the hand-car without being fastened, is immaterial, because appellant was not injured thereby. Nor was it negligence to permit him to take position on front end of the car, because, while the actual injury is likely to be more serious to a person falling or knocked off the front than off the rear end, the danger of being injured is not, as appears from the evidence, so great.

It, however, seems to us plain that, whether the section-boss was guilty of negligence or not, the injury received by appellant was not the proximate result of his want of knowledge of the danger of stooping to throw the hammer aside, but was caused by his own fault, and might have been avoided by the exercise by him of ordinary care. For the evidence does not show there was a reasonable probability of his being injured or endangered by the hammer handle, and if it had been necessary, which does not appear, for it to be put aside, he might, by calling the attention of the section-boss, have had the car stopped for the purpose.

In our opinion there is no evidence showing or tending to show a cause of action in favor of appellant.

Judgment affirmed.

Magowan v. Branham, &c.

CASE 98—PETITION EQUITY—MAY 19.

Magowan v. Branham, &c.

95	581
1124	145

APPEAL FROM MENIFEE CIRCUIT COURT.

1. **ACTION TO QUIET TITLE.**—It seems to the court that the allegations of the petition in this case, if sustained by proof, are sufficient to enable plaintiffs to maintain their action so far as it is in the nature of a bill of peace. But even if not, as defendants in their answer and counter-claim prayed for their title to be quieted, adverse to plaintiff, and tendered an issue involving question of superior title, it was competent for the lower court to try and determine it.
2. **ADVERSE POSSESSION.**—It is immaterial whether the deed under which plaintiff claims was effectual to pass a good title, as the grantee, from the date of it, took possession of the land by tenants and held and claimed it adversely to extent of his boundary for a period long enough to give him a possessory title. And the deed is, therefore, now to be considered with reference simply to the extent of such boundary described and claimed by him.
3. **THE RECITAL IN THE DEED THAT THE LAND CONVEYED IS PART OF A CERTAIN SURVEY, MUST YIELD TO CALLS**, about the correctness of which there can be no question, and the deed will be held to embrace land included within such calls, although outside the survey referred to.
4. **CONSTRUCTION OF DEED.**—By "the upper cliffs on each side Gladly Creek," to which the land conveyed was stipulated to run, was manifestly meant cliffs of the tributary branches as well as those of the main creek, because the cliffs, by reason of the peculiar formation of that particular region, constituted plain, and in fact the only practicable, landmarks.

WOOD & DAY FOR APPELLANTS.

1. In construing a deed, the intention of the parties at the time of making the deed should prevail, and technicalities should give way to such intention. (6 Ky. Law Rep., 568; 9 Ky. Law Rep., 523; 10 Ky. Law Rep., 779, 852; 60 Ind., 337; 122 Ill., 317; 38 Cal., 481; 25 Cal., 449; 61 N. Y., 681; 82 Ky., 379.)
2. The object of the description of lands in deeds is to furnish the means of identification, and where the lands can be located by it, it is sufficient. (108 Ind., 180; 73 Ind., 407; 89 Ind., 880.)
3. The description should be liberally construed, and a defect in one part may be corrected or supplied by accuracy employed in another part. (29 Ind., 1; 101 Ind., 310; 6 Mon., 432.)
4. **Monuments control**, and an omission of State, county or grant does not invalidate the conveyance. (119 Ind., 181; 16 Ohio, 22; 30 Am. Dec., 734; 35 Am. Dec., 374.)

Magowan v. Branham, &c.

THOMAS TURNER AND C. CYRUS TURNER FOR APPELLEES.

- 1 The general description in the deed from Duckham to Magowan, that it conveyed the lands in the Dean Timmons patent, must prevail, the particular description being vague and uncertain. (Notes to Heaton v. Hodges, 30 Am. Dec., 735; Ela v. Carroll, 9 Am. Dec., 46; Foss v. Cri-p, 20 Pick., 121; Henderson v. Mack, 82 Ky., 379.)
- 2 The deed from Duckham to Magowan is void for uncertainty. (Hamilton v. Fugate, 81 Ky., 366.)
- 3 The marshal's tax deed is void. One who claims under such a deed must show that all the steps necessary to a valid sale were taken, and the recitals of the deed are not sufficient for that purpose. (Pryor v. Hardwick, 15 Ky. Law Rep.; Terry v. Blight, 3 Mon., 271; Johnson v. McIntyre, 1 Bibb, 295.)
- 4 Appellants have not shown either paper or possessory title. Nor have they shown any actual possession, without which they can not maintain trespass *quare clausum fregit*. The act of 1854 is not in force. (Hillman v. Hurley, 82 Ky., 626; 6 Ky. Law Rep., 682.)
- 5 To maintain a bill of peace plaintiffs must show both title and actual possession. (Kincaid v. McGowan, 87 Ky.); and they must also allege that the claim of the defendants is hostile to theirs. (Campbell v. Disney, 18 Ky. Law Rep., 919.)
- 6 By occasionally herding or grazing stock on the land plaintiff did not obtain possession or title. (Moss v. Scott, 2 Dana, 275; Lillard v. McGee, 3 J. J. Mar., 552; Hinton v. Fox, 3 Litt., 884; Caskie v. Lewis, 15 B. M., 32; Wickliffe v. Ensor, 9 B. M., 259.)
- 7 Deeds under which a defendant has entered upon land, although invalid, can be used to show the boundary to which he claimed. (Clark v. Jones, 16 B. M., 126; McMillen v. Hutchinson, 4 Bush, 613; Taylor v. Buckner, 2 Mar., 19; Lander v. Reynolds, 3 Litt., 14; Shackelford v. Smith, 5 Dana, 240.)

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

W. C. Magowan and others, devisees of James P. Magowan, brought this action against William Branham and others, alleging they were owners and in actual possession of a tract of land described in their petition; that defendants, all of whom are insolvent, unlawfully and without right entered upon said land and cut and removed a large number of saw-logs, and are giving out in speeches they own said land and claiming it adverse to plaintiff, whose title is being thereby clouded.

Magowan v. Branham, &c.

The relief prayed for is an injunction restraining defendants further cutting and removing timber, damages for value already cut and removed and judgment quieting their title. On the same day they brought another action to recover possession of saw-logs cut and not then removed from the land.

In their answer, made a counter-claim, two of the defendants, Vanarsdale and Carter, allege they are owners and in possession of a large tract of land described, which includes the land sued for, and pray for judgment quieting their title. The two actions were consolidated and transferred to equity, and by the final judgment dismissed.

It seems to us, though argued by counsel for appellees otherwise, that the allegations of the petition, if sustained by proof, are sufficient to enable plaintiffs to maintain their action so far as it is in the nature of a bill of peace. But even if not, as defendants, in their answer and counter-claim, prayed for their own title to be quieted, adverse to plaintiffs, and tendered an issue involving questions of superior title, it was competent for the lower court to try and determine it.

It appears that about the year 1786 the State of Virginia issued four patents for mountain land situated in what is now Menifee County, one to John Carnan for about 20,000 acres, one south of and adjoining it to Dean Timmons for about 22,000 acres, one west of and adjoining it to Roberts for about 18,000 acres, and one south of the latter and west of Timmons' survey to John Carnan for about 10,000 acres, each tract being in form a parallelogram. The line dividing the two first-named surveys is S. 81 W., as is the one dividing the two last-named, though not an extension of the other, being farther south.

Magowan v. Branham, &c.

The line which divides the survey of John Carnan of 20,000 acres and Roberts' survey, and also the Timmons and John Carnan survey of 10,000 acres, is S. 8 E. The two latter, being south of the others, extend beyond and are each bisected by Red River, the general course of which is perhaps west, or a little south of west. A tributary, called Gladly Creek, rises inside the John Carnan survey of 20,000 acres, and after flowing several miles through it, in a general course southwest, crosses the dividing line S. 81 W., and flows diagonally through the Timmons survey, finally intersecting Red River, within limits of the John Carnan survey of 10,000 acres, a little west of the line S. 8 E.

It appears from the map, filed as evidence, that all, or nearly all, the branches or tributaries of Gladly Creek rise north of it and inside the John Carnan survey of 20,000 acres. The tract in controversy, as well as the larger tract claimed by defendants, is situated on these tributaries, and the land is valuable principally for timber and minerals; for the valleys of Gladly, as well as of its tributaries, are very narrow and bounded by sandstone cliffs from one hundred to one hundred and fifty feet high, having very few gaps or breaks.

There is filed in this case a deed from John McCalla, Collector of Internal Revenue, to Thomas Duckham, executed in 1839, for the whole of the John Carnan survey of 20,000 acres, which, as recited in the instrument, was made in pursuance of a public sale in 1816, under act of Congress of the United States, by collector of direct taxes. We need not determine as to validity of that deed, nor inquire how Duckham acquired title to the Dean Timmons survey, to which, as well as the John Carnan survey,

he seems to have set up claim at an early day, and of which he continued to sell parcels to various persons without question until all was disposed of, so far as this record shows. There is evidence showing that more than sixty years before commencement of these actions, James S. Magowan, father of James P. Magowan, set up claim to parts of the four surveys mentioned, taking possession thereof by tenants. But neither the precise locality of the tract or tracts claimed by him, nor evidence of paper title are shown in this record. But whatever claim he had was, about 1840, transferred to his son, James P. Magowan, and February 2, 1842, Thomas Duckham conveyed to him a described boundary of land by deed, the proper construction and meaning of which the lower court seems to have regarded as decisive of this case. The land conveyed is described therein as follows: "All that boundary of land as follows, to-wit: Beginning at Powell Rose line on Glady creek, in the county of Montgomery (now Meniffee), and running on each side of Glady's creek, up the banks thereof as far as the upper cliffs on each side of said creek, and up said creek to James Cock's line, the said land being a part of Dean Timmons' survey of 22,000 acres. Said Duckham reserves to himself all minerals and mines in the bowels of the earth in said boundary of land and the use of the timber included in said boundary, and a mill seat on said creek, the said tract of land lying and being in the county of Montgomery on the waters of Red River. The said Duckham hereby sells and conveys the same to said Magowan."

The lower court seemed to be of opinion that the land thus conveyed was entirely within boundary of the Dean Timmons survey, and to that extent restricted plaintiffs'

Magowan v. Branham, &c.

right of recovery. We think the court was correct in assuming that to all the land included within boundary thus described, wherever it may be, plaintiffs have title. For without determining whether the deed was effectual to pass a good title, the evidence is satisfactory to us that James P. Magowan, from the date of it, took possession by tenants of the land and held and claimed it adversely to extent of his boundary for a period long enough to give him a possessory title. The deed is, therefore, to be now considered with reference simply to the extent of such boundary described and claimed by him. The evidence shows that as early as 1849, he being on the land designated, claimed a boundary that included not only the land now in controversy, but very much more, and that he then had tenants on the land so claimed, as there had been for many years previously. For he had, prior to that date, purchased other tracts from Duckham, and his father had held and claimed other tracts also.

In regard to the actual boundary intended by the parties to the deed of 1842 to be conveyed, it appears from the evidence that Powell Rose's line crosses Gladly Creek at or near, though below, mouth of Salt Creek, a tributary, and not very far south of the dividing line between John Carnan and Dean Timmons' survey, and that continuing the case up and on each side of Gladly Creek to James Cock's line, necessarily locates very much greater portion of the land inside the Carnan survey than inside the Timmons' survey, which is comparatively little. As such would be the result of following calls for objects and according to courses well known to the parties, we are bound to conclude that the recital the land was inside the Timmons' survey was a mistake, if it be inter-

Magowan v. Branham, &c.

preted so as to mean wholly inside. And as the grantor had, or claimed, title to that part of the land conveyed which is inside the Carnan survey, as well as that inside the Timmons survey, making such incorrect recital yield to calls, about the correctness of which there can be no question, does not materially affect the rights of either party, but, on the contrary, conforms the deed to their evident intention.

We think it is also clear that Magowan intended to buy and Duckham intended to convey all the land lying on Gladly Creek and branches west of Cock's line, north of Powell Rose's line and east of the line S. 81 E., between the Carnan and Roberts' surveys, for two principal reasons. First, Duckham then neither owned nor claimed any other land in the southwestern corner of the Carnan survey except the boundary now claimed by plaintiff, and it was not practicable or worth the expense of dividing it, by running and making a line across the cliffs. Second, by "the upper cliffs on each side of Gladly Creek," to which the land was stipulated to run, was manifestly meant cliffs of the tributary branches, as well as those of the main creek; because the cliffs, by reason of the peculiar formation of that particular region, constituted plain, and in fact only practicable, landmarks.

It seems to us the evidence shows that James P. Magowan, in virtue of the deed made to him in 1842 by Thomas Duckham, claimed to a well-defined boundary, including all the land in controversy, and by tenants had actual and adverse possession thereof from that date long enough to acquire title.

The defendants claim under a quit-claim deed from one Frisby, executed in 1874. But he had no paper title, nor

Commonwealth, by Attorney-General, v. Addams, Clerk.

does the evidence show he ever had actual possession of any part of the land in dispute long enough to acquire title; and as showing defendants had no faith in the title he attempted to convey, they procured patents to be thereafter issued for different parcels of the land, all of which were void, because for land within the John Carnau survey. And in 1876 the various patentees, including wives of defendants, went through the farce of all uniting in one deed to the defendants, for the land thus severally claimed under void patents. In our opinion plaintiffs have shown a valid title to all the land in dispute and right to recover it, together with damages for the alleged trespasses.

Wherefore, the judgment of the lower court is reversed and cause remanded for judgment quieting plaintiffs' title, and further proceedings consistent with this opinion.

CASE 99—AGREED CASE—MAY 19.

Commonwealth, by Attorney-General, v.
Addams, Clerk.

APPEAL FROM FRANKLIN CIRCUIT COURT.

1. CONSTITUTIONAL LAW—POWER OF LEGISLATURE TO CHANGE COMPENSATION OF OFFICER DURING HIS TERM.—Under the present Constitution of this State the Legislature has no power to change the compensation of an officer during his term of office, whether he be a salaried officer or paid by fees. Therefore the act of June, 1893, requiring the clerk of the Court of Appeals to pay into the State Treasury all fees received by him after retaining, as a salary for himself, four thousand dollars, and after paying his assistants or deputies, can not, even if otherwise constitutional, apply to the present clerk, who was in office at the time of the passage of the act, and even prior

95	588
103	853
103	676
95	588
105	785

95	588
112	835

Commonwealth, by Attorney-General, v. Addams, Clerk.

to the adoption of the present Constitution, which continued him in office during the term for which he was elected, which has not yet expired.

2. **THE LEGISLATURE CAN NOT DELEGATE TO ANOTHER DEPARTMENT OF THE GOVERNMENT ITS POWER TO MAKE LAWS**, and therefore the act in question here is unconstitutional in that it attempts to delegate to this court the power to fix the salaries of the deputies of the clerk of this court, which section 246 of the Constitution provides shall be fixed "by law."

W. J. HENDRICK, ATTORNEY-GENERAL, FOR APPELLANT.

THOMAS H. HINES FOR APPELLEE.

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

A. Addams, the present clerk of the Court of Appeals, was in office and in the discharge of his duties prior to the adoption of the present Constitution.

In the month of June, 1893, the Legislature passed an act requiring the clerk to report to the auditor all fees received by him, and after retaining for himself as a salary four thousand dollars, and after paying his assistants or deputies and all expenses of the office, the balance remaining to be paid to the auditor for the State. A heavy penalty is imposed on the clerk for failing to comply with the provisions of the act. There is a further provision to the effect that the salaries of the clerk's deputies shall be fixed by the Court of Appeals. The clerk it seems has made no report of the proceeds of his office, on the ground the law has no application to his term of office, and, if so, is unconstitutional. Under the former Constitution it was held that the fees of officers, created by law or by the Constitution as distinguished from salaried officers, were, at any time, subject to legislative control, and could be increased or diminished at the will of the law-making power.

Under the present Constitution the Legislature is not

Commonwealth, by Attorney-General, v. Addams, Clerk.

only prohibited from changing the salaries of public officers, so as to affect those in office during their terms, but by section 161 of the Constitution it is provided: "The compensation of any city, county, town or municipal officer shall not be changed after his election or appointment, or during his term of office," etc. So, by these express provisions of the organic law, it was evidently intended to prevent any interference with the salary or compensation of a public officer during his term of office.

While the office of clerk of the Court of Appeals is not expressly mentioned, it is an office not only recognized by the Constitution, but by section 120 it is expressly provided: "The present clerk of the Court of Appeals shall serve until the expiration of the term for which he was elected, and until his successor is elected and qualified;" and, therefore, it follows that the office of clerk of Court of Appeals must, so far as the compensation is concerned, fall within the spirit and meaning of the provisions of the Constitution preventing legislative interference with the compensation during the term of office.

There has been no change made as to the duties of the office, or in its creation or organization, by the present Constitution, as would necessarily require or authorize the conclusion its framers intended the compensation should be increased or diminished, but, on the contrary, in looking to the debates on this subject had in the convention, those favoring the reduction of compensation and salaries to public officials, and mentioning especially the office of clerk of the Court of Appeals, disclaimed any purpose of interfering with the compensation of the present incumbent. (Debates in Convention, vol. 3, 4202, 4203, 4236.)

The clerk had, as they doubtless knew, employed his deputies and contracted for their services during his term of office; and there is, therefore, no reason for departing from the entire spirit and meaning of the present Constitution and adopting the judicial interpretation given the former instrument, by which the compensation of officials could be changed at any time the Legislature might deem proper. The right of the Legislature to regulate the fees of the person succeeding the present clerk, after his term expires and before his successor is elected and qualified, is unquestioned, and the act before us would be construed as intended to affect his successor, if otherwise constitutional.

Section 246 of the Constitution provides: "No public officer, except the Governor, shall receive more than five thousand dollars per annum as compensation for official services, independent of legally authorized deputies and assistants, which *shall be fixed and provided for by law*. The General Assembly shall provide for the enforcement of this section by suitable penalties, one of which shall be forfeiture of office by any person violating its provisions." Whether or not the principal would forfeit his office by reason of his having a deputy whose salary is not fixed by law is not necessary to be decided, but the framers of the Constitution evidently designed to enforce compliance with this section by imposing heavy penalties for its violation. If the deputy is paid by the principal out of what the former obtained for compensation, or from his own pocket, we see no reason for complaint by any one, or that it would violate this provision of the Constitution.

The Legislature, by its present enactment, has conferred the power on this court to fix the salaries of the clerk's

Commonwealth, by Attorney-General, v. Addams, Clerk.

deputies, when it is plainly required that a law should be enacted fixing the sum to which they are entitled. The attempt to confer such a power takes from the legislative department of the State the responsibility of fixing compensation for a certain class of officials, and places it upon the judiciary. The Constitution requiring the compensation to be provided for by law, means that the Legislature, to which belongs the sole power of making laws, shall regulate this compensation, and that branch of the Government has no power to delegate this right to another branch by making the judiciary the agent for fixing salaries or compensation for State officials. A law is not a complete law, when it is nothing more than a delegated power attempted to be given by the Legislature to some other department of the Government to make the law. The law is not enacted and this court asked to approve it, but we are required to fix the compensation.

The sole power to make laws is confided to the Legislature, and in this case that body has surrendered its own judgment to that of this court, in fixing these salaries, saying in effect that with the exercise of your judgment we will be satisfied. This can not be done, and this court, recognizing the wisdom of requiring each department of the Government to act within its own sphere, would, necessarily, refuse to comply with the legislative will if the act applied to the present clerk of the court.

It could not be carried into effect if it did apply, as there is no salary fixed by law for his deputies or assistants.

The court below having adopted this view of the point raised the judgment is affirmed.

McDonald v. Norman, Auditor.

CASE 100—MANDAMUS—MAY 22.

McDonald v. Norman, Auditor.

95	593
113	817

APPEAL FROM FRANKLIN CIRCUIT COURT.

95	593
e129	513

A CLAIM AGAINST THE STATE FOR WORK DONE IN COPYING AND ENGROSSING BILLS UNDER EMPLOYMENT OF THE CLERK of the House of Representatives, by direction of the House, is a "contingent expense" of the House, and payable out of the State Treasury upon a voucher, countersigned by the clerk, as provided by section 3 of article 1, chapter 15, General Statutes, now section 342 of the Kentucky Statutes. And as the payment of such "contingent expenses" is expressly provided for by a statute duly passed, the payment does not violate section 230 of the Constitution, which provides that "no money shall be drawn from the State Treasury except in pursuance of appropriations made by law."

THOMAS H. HINES FOR APPELLANT.

Cited: Sections 58 and 230 of Constitution; section 3, article 1, chapter 192, acts 1891-2-3, page 853.

WM. J. HENDRICK, ATTORNEY-GENERAL. FOR APPELLEE.

Cited: Section 58 of Constitution; General Statutes, chapter 15, article 1, section 3.

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

It is shown from the record before us that G. R. Kellar, clerk of the House of Representatives (Session 1891-2-3) was directed by that body, in order to the proper expedition of its business, to employ some one to do such copying and engrossing as he and his assistants could not do.

The appellant, McDonald, was so employed by the clerk, and did work of the character indicated to the amount of \$1,149.50.

On August 12, 1892, the House unanimously passed this resolution:

"RESOLVED, That the Auditor of Public Accounts is
Vol. 95—38.

McDonald v. Norman, Auditor.

hereby directed to issue his warrant on the treasury to such persons as have done engrossing and copying for the clerks of this House, which warrants the Treasurer is directed to pay:

“Provided, The vouchers for such work shall be countersigned by the clerk of the House, and approved by a majority of the Committee on Printing and Accounts, and the price shall not exceed,” etc. (See House Journal, page 1902, volume 2.)

The itemized account of the appellant is thus indorsed:

“I certify the above account as a contingent expense of the General Assembly, the same having been directed to be done by the House at the price named herein. This voucher is hereby certified to the Auditor for payment, under section 3 of article 1, chapter 15 of the General Statutes.

“G. R. KELLAR, *Clerk H. R.*

“Approved:

“N. S. WALTON,

“A. J. CARROLL,

“G. E. WILLETT,

Of Committee on Printing and Accounts.”

Upon declining to issue his warrant for the payment of the foregoing voucher the Auditor was proceeded against by petition for mandamus and upon an agreed state of case as set out above, the court dismissed the petition, and McDonald has appealed.

The law supposed to authorize the payment of this claim as a part of the contingent expenses of the General Assembly, is found in article 1, chapter 15 of the General Statutes, now chapter 192, article 1, Acts 1891-2-3 (sections 340, 342 of The Kentucky Statutes), which reads as follows:

"Section 1. The claims upon the treasury specified in this chapter shall be paid when due, by the Treasurer, to the persons entitled to the same, the warrant to be issued by the Auditor or other officer upon such proof of the service or demand as is herein required.

"Section 3. The pay and mileage of the speakers and members of both Houses of the General Assembly, the compensation to the officers of the two Houses, . . . the compensation of the chief clerks upon the order of each House, stating the amount due; all other contingent expenses of the General Assembly, upon the production of the vouchers, countersigned by the clerks of the respective Houses."

It is claimed in the language of the affidavit supporting the demand, "that the necessity for this work was an incidental contingency that developed in the midst of the session, caused by the large bills presented for consideration in re-enacting the statutes to conform to the provisions of the New Constitution, and the large number of amendments adopted by each House to nearly all such bills." And so we must regard it. It needs no argument to prove that this claim is a part of the contingent expense account of the House of Representatives, and it seems to us clear that its payment is authorized under the statute quoted and referred to by the clerk in his certificate on the claim. Section 230 of the Constitution (section 5, article 8 of the old) provides that "no money shall be drawn from the State Treasury except in pursuance of appropriations made by law." . . . And here we have a statute duly passed by both Houses and approved by the Governor, providing in plain terms for the payment of

McDonald v. Norman, Auditor.

the "contingent expenses of the General Assembly upon the production of the voucher, countersigned by the clerks of the respective Houses." And here, too, we have the voucher of the appellant for work directed to be done by one of the Houses under the employment of its clerk which is countersigned by the clerk as provided by law and also approved by its Committee on Printing and Accounts and ordered paid by a resolution. It was not intended that the clerk of one House should countersign the vouchers for the contingent expenses of the other House. The clerks of the two Houses are required to attest the vouchers for the expenses of their own Houses, respectively. Upon such attestation these expenses are payable, just as the pay and mileage of the speakers and members of the House of Representatives are payable, and just as are the salaries and compensation of public officers or other agents of the State, as provided in section 10 of the article and chapter mentioned.

Being a part of the contingent expense account of the General Assembly, it is no more a private claim against the State than is the pay or compensation of the officers mentioned. The court should have directed the payment of the claim, and the judgment dismissing the petition is reversed and cause remanded for that purpose.

Thompson, &c., v. Myers, &c.

CASE 101—PETITION EQUITY—MAY 26.

Thompson, &c., v. Myers, &c.

APPEAL FROM BOONE CIRCUIT COURT.

1. **AN HEIR OR DEVISEE TAKES THE LAND DESCENDED OR DEVISED TO HIM FREE FROM ANY LIEN FOR DEBTS DUE BY HIM TO THE ANCESTOR OR TESTATOR**, such debts not being upon the same footing as advancements made to him.

Where a creditor had his execution levied upon the undivided interest of his debtor in land devised to him, and at the sale under the execution became the purchaser, in a division of the testator's estate he was entitled to have allotted to him his debtor's share of the land devised, without any diminution on account of a debt due by the devisee to the testator.

2. **WHERE A DEVISEE DIES BEFORE THE TESTATOR**, his issue take as devisees directly under the will and not as his heirs-at-law, unless the will makes or requires a different disposition of the estate devised.

J. Q. WARD FOR APPELLANTS.

1. The children take the estate from their mother, or just as she would have taken it if she had survived her husband and died after him. (Gen. Stats., chap. 113, sec. 18.)
2. The real estate of a decedent descends to the heir free from any lien for debts due by the heir to the decedent, the estate of the decedent being upon the same footing as any other creditor of the heir. (Gen. Stats., chap. 81, sec. 15; *Scobee v. Bridges & Co.*, 87 Ky., 427; *Sadler v. Huffheimer*, 11 Ky. Law Rep., 670.)

Brown's Adm'r v. Mattingly, &c., 91 Ky., 275, criticised.

WM. H. HOLT AND S. W. TOLIN FOR APPELLEES.

1. The appellees did not take as heirs or distributees of Mrs. Myers, but they took under the will in their own right. (*Carson, &c., v. Carson's Ex'or, &c.*, 1 Met., 300.)
2. The debtor is not entitled to anything out of the estate, until he accounts for what he owes. He already has that much of the estate and is chargeable with it in the division. Thompson, the creditor, could only sell the debtor's interest, whatever it might be, and could get no more. (*Brown's Adm'r v. Mattingly*, 91 Ky., 275.)

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

In 1888 Joseph Myers died, leaving four children and

Thompson, &c., v. Myers, &c.

two children of a deceased son. He had, in 1884, executed a will, duly probated after his death, by which he devised his entire estate to his wife, Susan. But as she died first and the will did not make or require a different disposition of the estate devised, it resulted that his children and grandchildren, under sec. 18, chap. 113, Gen. Stats., as heretofore construed by this court, took it "not as heirs-at-law of the deceased devisee, but as legatees, directly and immediately under his will." *Carson v. Carson's Ex'or*, 1 Met., 300

It appears that all the legatees except one were indebted to the testator, as shown by their several promissory notes that went into hands of the executor. And they instituted this action for division of land left by him, according to their respective rights after charging each with his indebtedness. And to that end asked appointment of a commissioner to ascertain and report the amount each was indebted, and value of land subject to partition.

But appellant, Thompson, having a personal judgment against one of them, J. F. Myers, caused an execution issued and levied upon his undivided interest, being a fifth, in a track of about one hundred and sixty-five acres, which was regularly sold, he becoming purchaser and receiving the sheriff's deed therefor before the action was commenced. And, having been made a party defendant, he filed answer, setting up claim to and asking that a fifth of the land be allotted to him in virtue of his title to the interest of J. F. Myers, acquired in the manner mentioned.

But by the judgment rendered, the division and allotment is to be made in the following mode: To value of

the land, which the evidence shows is about five thousand dollars, is to be added aggregate indebtedness to the testator of all the legatees, amounting to about four thousand dollars, and the sum thus found divided into five parts; but the value to which each devisee is entitled to be fixed by deducting from the dividend, amount of his indebtedness. And as the amount of J. F. Myers' indebtedness is estimated at about one thousand six hundred and seventy-six dollars, it is manifest Thompson will get, under the judgment, much less than one-fifth in value of the tract of land.

If, as plainly appears, he acquired by purchase the legal title to an undivided fifth of land, prior to commencement of this action, he was entitled to have that quantity allotted to him without abatement, unless there was a pre-existing lien upon the interest of J. F. Myers.

The statute does not, it seems to us, create a lien in such cases expressly or by implication. Sec. 15, chap. 31, Gen. Stats., is as follows: "Any real or personal property or money given or devised by a parent or grandparent to a descendant shall be charged to the descendant, or those claiming through him, in the division and distribution of the undevised estate of the parent or grandparent, and such party shall receive nothing further therefrom, until the other descendants are made proportionately equal with him, according to his descendible and distributable share of the whole estate, real and personal, devised and undevised. The advancement shall be estimated according to the value of the property when given. The maintaining or educating, or the giving of money to a child or grandchild without any view to a portion or settlement in life shall not be deemed an advancement."

Thompson, &c., v. Myers, &c.

If the money loaned by the testator to his son, J. F. Myers, and for which he took and held to time of his death promissory notes, could be fairly regarded as advancements, then Thompson, purchaser of his interest, would be entitled in division of the land, to such quantity in value only as may be left after deducting from his share amount of the notes without interest. But it is not contended the notes are evidence of advancements made by the testator to his son, J. F. Myers, nor did the lower court treat them as advancements, upon which, under the section quoted, no interest could be counted, but as debts to which was added interest, whereby the estimated sum for which he should account, if an advancement, was doubled.

It seems to us a fair, indeed necessary, inference, that if the Legislature had intended to put debts due by an heir-at-law or devisee to the ancestor or testator upon the same footing as advancements made by him, there would be a statutory provision requiring such heir-at-law or devisee to account, in every case and at all events, for amount of such indebtedness, before he or his vendee or creditor could have any share of the estate. There is, however, a way by which an heir-at-law or devisee may be made to thus account before participating in distribution of personalty which goes into the hands of the personal representative. That may be accomplished through means of a set-off, pleaded by the executor or administrator. But under the statute of this State, as often construed by this court, an heir-at-law or devisee takes an estate in land charged only with debts and liabilities of the ancestor or testator. And in case of alienation, sec. 8, art. 1, chap. 44 Gen., Stats., makes this provision: "When

the heir or devisee shall alien, before suit brought, the estate descended or devised, he shall be liable for the value thereof, with legal interest from time of alienation to the creditors of the decedent or testator, but the estate shall not be liable to the creditor in the hands of a *bona fide* purchaser for valuable consideration."

If this was a contest between Thompson, a creditor of J. F. Myers, and purchaser of his interest in the land, and even a creditor of the testator, who had not acquired a prior lien, the title of the former would, in our opinion, prevail under that section, and he would be entitled to the share in the land thus purchased, without any abatement or diminution in favor of or for benefit of the latter. And, if so, we do not perceive upon what theory his title can be affected or interest diminished as heir of or in favor of the other devisees.

But the respective rights of a purchaser of an undivided interest of an heir-at-law or devisee, and of other heirs-at-law or devisees, in the matter of dividing land of the ancestor or testator, has been determined by this court in *Scobee v. Bridges*, 87 Ky., 427, where the precise question now before us was presented, except the ancestor died intestate. There this language was used: "The estate of the intestate stood only as an ordinary creditor of the son, the latter becoming a debtor only to the personal representatives upon their payment of the debts due by the son and for which the father was liable as the surety. The estate descended to the son free of any lien for the debts due to the father, and these creditors, having levied their executions and purchased this interest of Jas. W. Scobee, will hold it against any other creditor where no lien exists. The statute gives no lien, and the most

Thompson, &c., v. Myers, &c.

vigilant in acquiring a lien by operation of law will be entitled as against those who fail to coerce payment."

There not only was the question involved in this case directly decided, but the reason for the rule governing in all such cases stated. Two of the notes which Jas. W. Scobee had executed to his father were, however, for advancements, not debts; and, as to the amount of them, it was held the purchaser must, according to sec. 15, chap. 31, account in division of the land just as Jas. W. Scobee would have been required to do. And thus was again, as had been often before, recognized by this court, the distinction to be observed between debts due by an heir-at-law or devisee to the ancestor, and advancements made by him, in determining the rights of a purchaser or creditor in relation to claims of other heirs-at-law or devisees.

That case is decisive of the question here involved, and must control, unless overruled, which we now see no reason for doing.

The case of *Brown's Adm'r v. Mattingly*, 91 Ky. 275, does not necessarily conflict with it. For the contest there was between the administrator and an attaching creditor of one of the heirs-at-law; and the sole question involved was whether the former could plead indebtedness of that heir-at-law to the estate as set-off to his distributive share of personalty which had been attached by the latter. But whether the administrator had a right to rely upon the set-off, except to the extent of extinguishing that distributee's interest in the personalty, was not decided. It is true it was there said that "if his distributive share in the personal estate is not equal to the amount thus received, the real estate ought to be held to

Cooper v. Arnett, &c.

be charged with the payment of the remainder, in the division, and he to receive that much less." But the other heirs-at-law were not before the court, and, consequently, it was not necessary to then determine their rights relative to that of the attaching creditor.

In our opinion, as the statute exists, Thompson was entitled to an undivided fifth of the tract of one hundred and sixty-five acres of land, without any diminution of quantity by reason of J. F. Myers' indebtedness to the testator.

Wherefore the judgment is reversed and cause remanded for further proceedings consistent with this opinion.

CASE 102—PETITION EQUITY—MAY 26.

Cooper v. Arnett, &c.

95 603
100 495

APPEAL FROM HOPKINS CIRCUIT COURT.

1. **THE LEVY OF AN EXECUTION UPON LAND WHICH HAS BEEN SOLD BY THE DEBTOR** in good faith gives the creditor no lien upon the land or upon the unpaid purchase money due by the purchaser, and the purchaser not being restrained, has the right, notwithstanding such a levy, to pay the money to the debtor.
2. **WHERE A DEBTOR HAS SOLD HIS HOMESTEAD AND INVESTED THE PROCEEDS IN ANOTHER HOMESTEAD**, it is not necessary, in order to entitle him to the exemption of the new homestead, as against a debt created prior to the purchase of the new homestead, but subsequent to the purchase of the original homestead, that he should allege that the sale was made with the intention to reinvest the proceeds in another homestead. It is sufficient that the reinvestment has in fact been made.
3. **SAME.**—Where a debtor owning land worth more than one thousand dollars, out of which he is entitled to the exemption of a homestead, sells it and invests one thousand dollars of the proceeds in another homestead, applying the surplus to the payment of his debts, he has

Cooper v. Arnett, &c.

the right to the exemption of the new homestead as against debts as to which the original homestead was exempt. Whether he would be entitled to the exemption if, instead of applying the surplus proceeds to the payment of his debts he still retained the money, is a question not presented.

A. T. DUDLEY AND MONTGOMERY MERRITT FOR APPELLANT.

1. The debtor is not entitled to the exemption claimed as he does not allege or prove that when he sold the Henderson land he intended to invest any part of the proceeds in other lands or real estate of any kind.
2. It is only when a housekeeper with his family has had his homestead *specifically* laid off to him, or has a homestead worth not more than one thousand dollars, that he can sell same and reinvest the proceeds in another homestead, or exchange it for another homestead and hold it against pre-existing debts. The law does not exempt one thousand dollars with which a man may purchase a homestead like it exempts a horse or other specific articles of personalty.

The right of homestead can not be raised by implication through the rule of liberal construction. (*Little's Guardian v. Woodward*, 14 Bush, 587.)

3. The homestead exemption is not an estate in the land, but only a privilege of occupying the same by a housekeeper with a family as against his creditors. (*Brame and Wife v. Craig*, 12 Bush, 407.)

WADDILL & NUNN AND C. J. WADDILL FOR APPELLEES.

1. The levy and sale, in so far as it attempted to affect the land of Sutton, was void.
2. The debtor is entitled to the homestead exemption claimed, the land having been purchased with proceeds of a homestead which was exempt. The homestead laws should be liberally construed in favor of the debtor. (*Thompson, &c., v. Heffner's Ex'or, &c.*, 11 Bush, 353; *Musgrave v. Parish*, 10 Ky. Law Rep., 998; *Carter Bros. & Co. v. Liles*, 5 Ky. Law Rep., 590; *Lear, &c., v. Totten, &c.*, 14 Bush, 101; 81 Ky., 332, 555; 80 Ky., 47; 79 Ky., 528; 78 Ky., 630; 10 Ky. Law Rep., 173; 9 Ky. Law Rep., 148; 8 Ky. Law Rep., 258; 6 Ky. Law Rep., 296; 5 Ky. Law Rep., 636.)

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

Appellee Arnett was the owner of a farm in Henderson County on which, in February, 1890, and prior thereto, he and his family resided, and in which he was entitled to a homestead. In April, 1890, he sold this farm for the sum of four thousand dollars, and at once invested

Cooper v. Arnett, &c.

two thousand four hundred dollars of the money in the purchase of two hundred and forty-four acres of land in Hopkins County. He then sold to appellee Sutton one hundred and twenty-five acres of the Hopkins County farm for one thousand four hundred dollars, retaining and residing on the balance—some one hundred and nineteen acres—with his family, and the value of which is estimated to be not exceeding one thousand dollars.

In February, 1890, Arnett became the surety of one Royster to the latter's creditors, and in April, 1891, the appellant, Cooper, as agent for such creditors, obtained, in the Henderson Circuit Court, a judgment against Royster and Arnett for some five hundred and fifteen dollars, and in July thereafter had an execution to issue to Hopkins County, where it was levied on the lands owned by the appellee, Arnett, and his vendee, Sutton. At a sale under the execution, appellant bought the tract for his debt and brought this action for an enforcement of his alleged lien.

It appears that Sutton did not pay some four hundred dollars of the purchase price of the one hundred and twenty-five acres until after the levy of the appellant's execution in July, and for that reason his land was sought to be subjected to sale. Of this contention it is only necessary to say that the debtor had the right to pay his creditor, unless prevented by attachment or other appropriate means. Sutton bought the land at a fair price, got a title bond therefor and paid all the purchase money therefor except four hundred dollars before the levy of the execution. That he did not get a deed therefor until after the levy and pay the balance of the purchase price does not result in placing his land in lien under the

execution. Arnett was not then the owner of it, and the mere levy does not affect Sutton's land or Sutton to any extent or for any purpose.

As to Arnett, it is evident that as he had a homestead in the Henderson County farm, he had one in the land bought in Hopkins County with the proceeds of its sale. It is said that the answer does not disclose that he sold the first farm with the intention of reinvesting in a homestead, and the purchase of the latter must be regarded as an original purchase of a homestead, and therefore the debt of the appellant was created prior to the purchase. We think this contention demands too strict a construction of the Homestead Act. Before any effort was made to reach the proceeds of the sale of the lands in Henderson County, or while such proceeds were in the hands of the debtor, at which time the inquiry might be material as to the intention with which the proceeds were held, the debtor does in fact invest it in a homestead, and this, we think, was not an original obtention or purchase of a homestead, or one obtained or purchased after the creation of the debt set up in this case.

But may a debtor, owning land worth four thousand dollars, sell it, invest one thousand dollars in other land, and then with three thousand dollars in his pocket set up his exemption? The state of case presented would differ only slightly from a case where the owner sold off three thousand dollars worth of his land, retaining one thousand dollars worth as a homestead, as he could clearly do.

But however beneficial the answer to this question might be to the appellant, it is not presented in this case.

When Arnett sold his Henderson County farm, he was largely in debt, and the proof discloses that he proceeded

to discharge his indebtedness out of the proceeds of the sale of his farm, and even with the Sutton purchase money was unable to pay all he owed, and borrowed other money for that purpose. This he had the right to do.

If he omitted the debts he owed as surety, the remedy of the creditor was by a different proceeding from this.

There is another reason why this question is not presented here. The answer of Arnett brings him within the protection of the homestead statute, and to deprive him of the benefit of the act, the appellant must plead the facts necessary for that purpose. This he does not do.

The levy of the execution and the sale of the lands of the appellee gave no lien to, and conferred no title on, the purchaser, and the judgment dismissing his petition is affirmed.

Ernst v. Shinkle.

CASE 108—PETITION EQUITY—MAY 26.

Ernst v. Shinkle.

APPEAL FROM KENTON CIRCUIT COURT.

CONSTRUCTION OF DEVISE — PROHIBITION AGAINST ALIENATION.—

Where a testator devised all his property to his widow and son "to share and share alike," except as to certain property specifically described, which was to belong to the widow for life, remainder to the son and his heirs, with the further provision that none of the real estate should be sold, "but remain for a perpetual investment, and only the revenue therefrom to be used," the widow and son took the fee-simple title to all the real estate, except that expressly devised to the widow for life, remainder to the son; and the prohibition against alienation being void, under section 27 of article 1, chapter 63, General Statutes, the deed of the widow and son conveying to appellant a part of the land devised passes a good title, which appellant is required to accept under his contract with the grantors for the purchase of the land.

RICHARD P. ERNST FOR APPELLANT.

1. The will does not create an estate tail.
Breckinridge v. Denny, 8 Bush, 523, distinguished.
2. Appellant does not contend that the provisions in the will which declare that the real estate shall never be sold are valid. On the contrary, such provisions are clearly invalid; not, however, because they create an estate tail, but because they are contrary to the statute or rule against perpetuities. (Gen. Stats., chap. 63, art. 1, sec. 27.)
3. We are not disposed to contend that appellees have a life estate only, or that there is a limitation on their power to convey, and we do not desire that the court shall so find, but are unwilling to take the property until the question is judicially determined. The question is therefore submitted to the court.

J. W. BRYAN FOR APPELLEES.

Nowhere in the will under consideration is there any attempt to put any limitation whatever on the estate devised to appellees, except to inhibit its alienation, and by it is created an estate which, in former times, would have been deemed an estate tail, and which, by the law of Kentucky, is converted into an estate in fee-simple. (M. & B. Stat. Law of Ky., vol. 1, p. 442; Stanton's Rev. Stat. of Ky., vol. 2, p. 227; Gist's Heirs v. Robinet, 3 Bibb, 3; Breckinridge, &c., v. Denny, &c., 8 Bush, 523.)

Best v. Conn, &c., 10 Bush. 37, explained.

Ernst v. Shinkle.

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

Amos Shinkle died in the city of Covington in the year 1892, leaving a last will that was admitted for probate and is now in this court for construction. He left his wife and one son, Bradford Shinkle, surviving him. The will, or that part of it for construction, reads:

"I give, devise and bequeath unto my dear and faithful wife, Sarah Jane Shinkle, and my son, Bradford Shinkle, all the remainder of my property of whatsoever kind in equal parts to each one, to share and share alike in every particular, except that the home house, No. 165 East Second street, Covington, Ky., and all the household furniture of whatsoever kind belonging to A. Shinkle, shall belong to my wife during her lifetime; also, the farm in the country, called 'Center Farm;' also, the carriage and pair of horses; also, the home stable and greenhouse attached to the home dwelling in the city of Covington, Ky., at 165 East Second street. These last-named articles and real estate are to belong to my wife, and at her death it shall revert to my son, Bradford Shinkle and his heirs. Bradford Shinkle shall be permitted to live in the home dwelling with his family during his lifetime free from house rent. Taxes on the home dwelling, as well as other taxes, shall be paid out of the common fund. I further declare and say that it shall not be lawful to sell any of my real estate, unless it be the home dwelling, when, if sold, funds shall be invested in other real estate, which shall never be sold, but remain for a perpetual investment of the estate of A. Shinkle, and only the revenue arising therefrom shall be used.

"*I further consent that, if it should be thought best, the farm in the country, called 'Center Farm,' may be*

Ernst v. Shinkle.

sold either by my wife, or, if not sold in her lifetime, it may be sold by my son, but the proceeds thereof must be invested in real estate, and held as other real estate is held in this my will, not to ever be sold. . . . I hereby appoint my wife, Sarah Jane Shinkle, and my son, Bradford Shinkle, my executors, without security, with full power to do and perform any and all things that I could do if I was living, except as above stated (in regard to selling my real estate)."

The testator owned a lot of ground having no connection with the residence property on Second street, or the *Center Farm*, nor is it incumbered in any manner by other provisions of the will, or made the subject of a specific devise. This lot of ground, as the pleadings will show, was sold by the devisees, the widow and Bradford Shinkle, to Jno. P. Ernst, the appellant, and he declines to accept a deed from them on the ground that they have only a life estate, or, at least, are not vested with the fee-simple title.

The plain purpose of the testator was to prevent any sale of his realty for all future time, and also to vest the title in his devisees, with the right of alienation taken from them. This restraint upon alienation is not made a condition upon which they may accept the title, but a vesting of the fee, or an attempt to do so, in such a way as to prevent any sale or conveyance of the property, and in this manner create a perpetuity. What property he permits to be sold, the proceeds he requires to be invested perpetually, withholding in express terms all power of disposition by his devisees.

While this devise does not create an estate tail, or a perpetuity, as defined by the common law, still the pro-

Ernst v. Shinkle.

visions of the will are in direct conflict with our statute on the subject. Sec. 27 of article 1, chapter 63, Gen. Stat., provides: "The absolute power of alienation shall not be suspended by any limitation or condition whatever for a longer period than during the continuance of a life and lives in being at the creation of the estate and twenty-one years and ten months thereafter."

In this case a power of alienation is taken from the devisees, in express terms, and the provision of the will by which alienation of the estate is prohibited must be held void and of no effect. Nor is there any attempt to create a life estate, except as to the homestead on East Second street and the farm known as Center Farm. This particular realty is given the wife for life, remainder to the son, Bradford, and his heirs, which creates a vested remainder in fee in Bradford as to this estate, and as to all the other realty, including the lot in question, the fee-simple title is in the devisees, the widow and the son, Bradford. There was no purpose on the part of the testator to create a life estate on any of the realty, except as to the homestead and the Center Farm, and the fact of his creating a life estate, as to this particular real estate, in the widow, remainder to his son, negatives the idea of the testator's intention to create a less estate than a fee as to any other part of his realty. The testator, doubtless, believed he could pass the fee restricting the devisees in the power of alienation, so as to create an estate that could never be disposed of, and that would pass by descent from his devisees to those who would inherit from them, never at any time passing, by conveyance or devise, by those who took or held the realty through or from his

Martin, Adm'r, &c., v. Louisv. & Nashv. R. R. Co.

immediate devisees. Such was his plain intent to be gathered from his will.

The only limitation placed by the testator on the estate devised to the appellees is that inhibiting its alienation; and such a limitation being void, the appellant must accept the deed tendered him and pay the purchase money. They have the fee-simple title.

The judgment below, according with these views, is now affirmed.

CASE 104—PETITION ORDINARY—MAY 81.

Martin, Adm'r, &c., v. Louisville & Nashville Railroad Company.

APPEAL FROM KENTON CIRCUIT COURT.

1. CONTRIBUTORY NEGLIGENCE. — A railroad brakeman, engaged in coupling and uncoupling cars in the yard of the company, is not guilty of contributory negligence in riding on a ladder on the side of a freight car in going from one point of work to another.
2. RAILROAD CARS LEFT STANDING ON ONE TRACK IN DANGEROUS PROXIMITY TO ANOTHER. — Where a track in the yard of a railroad company was reserved and kept clear for the use of another company, and the servants of the latter company left "dead" cars standing on the track in such close proximity to a track used by the former company as to come in contact with the body of a brakeman riding on the ladder of a car moving on that track, resulting in his death, the latter company is liable.
3. SAME. — The company in whose yard the cars were left standing is not liable, as the engineer of the train on which the brakeman was riding at the time of his death could not discover the danger by reason of the darkness, and the "dead" cars had not remained in their dangerous position such a length of time as to afford the yardmaster a reasonable opportunity of discovering the danger.
4. THE NEGLIGENT ENGINEER IS LIABLE DIRECTLY FOR HIS OWN NEGLIGENCE and can not escape responsibility upon the ground that he was acting merely as agent for another.

Martin, Adm'r, &c., v. Louisv. & Nashv. R. R. Co.

WM. GOEBEL FOR APPELLANT.

1. It was negligence to leave a car on a connecting track so close as not to admit of safe passage of a switchman stationed on ladder on side of car. And it was not contributory negligence for Smart to be upon the ladder. (*L. & N. R. Co. v. Earl's Adm'rx*, 94 Ky., 368; *K. C., Memphis, &c., R. Co. v. Burton*, 53 Am. & Eng. Railroad Cases, p. 115.)
Therefore there must necessarily be a reversal as to the Chesapeake & Ohio Railway Company, and as to Robinson, its engineer, who placed the car on the track.
2. Robinson, the negligent engineer, is jointly liable, and may be jointly sued. (*Shearman & Redfield on Negligence*, sec. 244.)
3. The railway yard being that of the Louisville & Nashville Railroad Company, and the car which did the injury having been placed therein by its authority, the matter stands as if that corporation had itself placed the car where it was. Furthermore, it was the duty of that company to keep its tracks unobstructed and safe for its employes in the discharge of their duties. And in addition to this, it was the duty of the engineer on the train on which Smart was employed to discover the obstructing car and protect Smart from injury. (Cases cited above.)

J. W. BRYAN FOR APPELLEE, LOUISVILLE & NASHVILLE RAILROAD COMPANY.

No negligence whatever can be imputed to the Louisville & Nashville Railroad Company, and applying the law as declared in *L. & N. R. Co. v. Earl's Adm'rx*, 94 Ky., 368, there must be an affirmance as to that company.

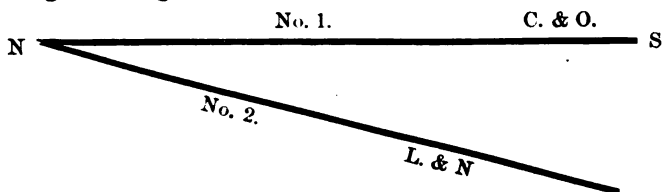
JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

The appellant's intestate, James Smart, was fatally injured while in the discharge of his duties as switchman in the yard of the appellee, the Louisville & Nashville Railroad Company, at Central Covington. By his petition the appellant seeks to recover damages for the death of Smart, because of the gross and wanton negligence of all of the appellees. By separate answers the material averments of the petition were denied and contributory negligence, on the part of Smart, pleaded. Upon the conclusion of the plaintiff's testimony the court peremp-

Martin, Adm'r, &c., v. Louisv. & Nashv. R. R. Co.

torily instructed the jury to find for the appellees, and this appeal questions the correctness of that instruction.

The proof conduces to show that on the night of September 14, 1892, Smart, as switchman in the service of the Louisville & Nashville road, was engaged with other employes of that road in making up trains—switching—in the company's yard, and had made a coupling on track No. 2 of the Louisville & Nashville, as shown in the following drawing:



He then signaled with his lantern to the engineer in charge to move forward, and immediately climbed on a ladder on the side of the moving box-car to ride to a point further north, where other work awaited the crew. At a few minutes before this—not exceeding ten—the appellee, Robinson, in charge of a Chesapeake & Ohio train, which had been loaded with freight in Cincinnati to be delivered to the Louisville & Nashville people in their Covington yard, brought some twenty-five cars into the yard and “kicked” them in on track No. 1, which, though in the Louisville & Nashville yard, was reserved and kept clear for the use of the Chesapeake & Ohio road. Robinson then detached his locomotive and with it quit the yard. He left the “dead” cars, however, on track No. 1 in such close proximity to track No. 2 that the side or corner of the standing or “dead” car next to the switch was within a few inches of the line of passing cars on the other track. The space left was not sufficient to

admit of the safe passage of persons on the sides of cars running on track No. 2. The night was dark, and this dangerous proximity was not noticed by any of the crew on the Louisville & Nashville (or No. 2) track. Smart had ridden but a short distance when he was knocked off and fatally crushed.

The first question presenting itself, as it was upon the court's solution of this, we are told, that the peremptory instruction was based, is, was Smart guilty of such contributory negligence as but for it the injury would not have happened? Upon a similar state of case this court answered this question in the negative in the case of Louisville & Nashville Railroad Company v. Earl's Adm'rx, 94 Ky., 368, and a like conclusion was reached by the Alabama Supreme Court in *Kansas City, &c., R. Co. v. Burton*, 53 Amer. and Eng. Railroad Cases, 115, and we adhere to that determination.

It is a matter of common observation that railroad companies furnish cars of the class in use on the occasion under consideration supplied with ladders, or appliances similar to ladders, to enable employes to discharge promptly and efficiently the duties imposed on them. Among those duties is their rapid transit from one part of the yard to another. The most prudent and cautious employes use these ladders or steps for that purpose. That is what they are for, as well as for ascending and descending over the sides of the cars. As said in the Earl case, "the custom of brakemen riding on the ladder from one point of work to another was clearly established. This was the well-known way of doing such work as was before Earl on this occasion." Of course, the rule is different with a passenger. He has no need

Martin, Adm'r, &c., v. Louisv. & Nashv. R. R. Co.

to thus ride and may not so protrude his person beyond the surface of the cars. A brakeman, however, after he has coupled or uncoupled certain cars, must oftentimes follow up the moving train and, by his signals given from the top or oftener from the sides of the cars, control the engineer in further work of the same kind. In going about this ordinary work in the usual way, he has the right to expect clear passage in his front. While he may not close his eyes to the perilous surroundings of his employment, he has the right to go about his ordinary work with a consciousness of safety, and is not required to see or look out for obstructions on the track. This is imposed on the superintendency. We conclude, therefore, that the deceased was not guilty of negligence on the night in question in riding on the appliances supplied for that purpose. We next inquire what act, if any, was the negligent one, and where, that caused the injury? We may say in general that we do not doubt it to be the duty of the engineer in charge to see as far as he may that the track is clear of dangerous obstruction, by which we mean obstruction dangerous not only from being immediately on the track, but by reason of being dangerously close to it. Such, also, would seem to be the duty of the yardmaster of the management in control of the yard. But however alert we may demand these persons to be, we can not require of them impossible or impracticable things. It is not even suggested that these officials had aught to do with placing these cars on the switch, or had any control of their movements; and we can not impute negligence to an engineer if he fails to see in the dark. Ordinarily, in cases of the kind we are considering, the engineer himself is in control of the cars "kicked in" on

the connecting switch, and if he leave them dangerously near he is at once chargeable with negligence. But in the case at hand the obnoxious cars were not placed by him and he is without fault in the premises. So the yardmaster of the owner can not during every minute of time see that those who bring cars upon the yard leave them in their precise and proper places. We do not doubt that if these "dead" cars had remained in their dangerous position such length of time as would have afforded the yardmaster a reasonable opportunity of discovering the danger, and he had failed to take steps to protect the workmen, negligence would be attributable to him and through him to his principal. Only a few minutes, however, elapsed from the time of the lodgment of the cars on track No. 1 before the accident occurred, and we are not disposed to regard this agent as neglectful of his duties. The case, therefore, as it is presented against the Louisville & Nashville road, need not be considered further.

It follows, however, from the principles announced that the appellee, the Chesapeake & Ohio Railway Company, through the wrongful act of its agent, Robinson, in the light at least of the proof as it has been presented by the plaintiff alone, was guilty of the negligence which caused the injury complained of. As said in the Earl case, "it was inexcusable negligence to leave the 'kicked in' car so close to the main track that the engineer's cab could barely pass it." Whoever else may be held to accountability for failing to afford the workmen engaged about the cars the protection to which they are entitled, and we have seen that the engineer of the moving train and the yardmaster in the superintendency of the prem-

Pence v. Commonwealth.

ises may be so liable under designated conditions, certainly the agent who actually places the cars in this dangerous position is guilty of negligence for which his principal is to be held accountable. While the proof is not as clear as it might be on the subject of who left the cars on the switch, the averments of the petition are that Robinson was the servant and agent of the defendant, the Chesapeake & Ohio Railway Company, and in control of its locomotive engine, and left the cars in the position described in the petition. This is not denied, as we construe the answer.

Of course the appellee, Robinson, is liable directly for his own negligence and can not escape responsibility on the contention that he was acting merely as agent for another.

The judgment is *affirmed* as to the Louisville & Nashville Railroad Company, and *reversed* as to the other appellees.

CASE 105—INDICTMENT—MAY 31.

Pence v. Commonwealth.

APPEAL FROM BREATHITT CIRCUIT COURT.

FAILURE TO MARK INDICTMENT "FILED."—While it is essential to the validity of an indictment that it should be indorsed "a true bill," and that indorsement signed by the foreman, the clerk's indorsement of the filing of the indictment is not essential, and when it has been omitted, it may be supplied at a subsequent term, and even after the jury has been sworn and a witness examined.

SAMUEL H. PATRICK FOR APPELLANT.

1. The making of an order filing the indictment and the indorsement of filing by the clerk were essential to its validity. (Criminal Code, sec. 121.)

Pence v. Commonwealth.

2. The failure of the clerk to make the order and indorsement was a clerical misprision which could only be corrected by the court on motion upon reasonable notice. (Civil Code, sec. 519.)
3. An order or judgment *nunc pro tunc* can only be entered when it has previously been ordered by the court to be entered but omitted by the clerk; that was not the case here. (12 Am. and Eng. Ency. of Law, p. 81.)

WM. J. HENDRICK, ATTORNEY-GENERAL, FOR APPELLEE.

The failure of the clerk to indorse the time of the reception and filing of the indictment was a mere clerical misprision, which by analogy in the practice of civil cases could be corrected on motion.

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

The two appellants, Henly Hays and William Pence, were indicted and convicted for burning the storehouse of Obediah Roberts, and have appealed to this court. Much of the testimony upon which Hays was convicted consisted of his own confessions, and as to Pence it is plain that he was wearing upon his person shoes that had been in this store, and in the endeavor to account for the manner in which he obtained the possession, failed to make it satisfactory to the jury, and in fact never obtained them in the manner detailed by him. He was with Hays on the evening preceding the night of the burning, and the jury knowing the parties and having before them the witnesses, have said that he is guilty, and of this we have but little doubt.

The only question necessary to be considered arises from the motion made by the attorney for the Commonwealth to have the clerk mark the indictment filed and insert also the day on which it was returned into court. It was discovered after the jury had been sworn, and a witness being examined, that the clerk had failed to make this indorsement when the indictment was presented by the foreman of the grand jury. The attorney for the

State then moved to have the indorsement made, it appearing the indictment had been returned into court with the other indictments at the term at which it had been found, but the clerk neglected to mark it filed. It is said that this was done without swearing the clerk or the Commonwealth's attorney, and, therefore, if proper then to make the indorsement, the testimony was not sufficient to authorize it. There was no objection made to the statement of the clerk, except as to his right to mark the indictment filed at a term other than the term at which the indictment was returned.

We perceive no objection to the action of the court below. It is not pretended that the grand jury had failed to return any indictment against these parties, and the indorsement filing it is to identify the term at which it was returned, and the omission of the clerk to do so is not such an irregularity as authorized the indictment to be quashed, or, as contended for by counsel, an acquittal of his clients.

When an indictment is found it must be indorsed a *true bill*, and that indorsement signed by the foreman, and without that indorsement it is not an indictment upon which the party charged can be tried; and while we perceive no such indorsement on the indictment in this case, we must presume it has been omitted in the copy made, as learned counsel raises no such question. The indorsement signed by the foreman is not only to enable the indictment to be identified, but it is the evidence of the fact that the indictment was concurred in by the grand jury, and must be held to be essential. While it is always proper to make an entry showing its presentation into court, and the filing by the clerk, the omission of the clerk to make such an entry does not affect the validity

Shouse v. Commonwealth.

of the indictment. When returned into court with the indorsement, a *true bill*, signed by the foreman, it is an accusation upon which the party can be tried, and the omission of the clerk to make such an entry may be supplied at a subsequent term, and certainly so in the absence of any proof showing that such an indictment was never returned. It is merely directory, that section of the Code, and is not essential to the validity of the accusation, and it may therefore be shown that the indictment was returned into court as required by the Code. (Criminal Code, section 121.)

Judgment affirmed.

CASE 106—INDICTMENT—MAY 31.

Shouse v. Commonwealth.

86 821
c. 113 624

APPEAL FROM ESTILL CIRCUIT COURT.

AN INDICTMENT accusing the defendant of the offense of cutting a named person "with intent to kill him" need not, in stating the particular circumstances of the offense, again charge that the cutting was done "with intent to kill."

WHITE & SMITH FOR APPELLANT.

The indictment does not charge a felony, and the court erred in instructing the jury upon the view that appellant could be found guilty of a felony. The indictment does not state the fact that the stabbing was done "with intent to kill" the wounded person. The mere stating of the offense to be wounding *with intent to kill* is not an allegation that it was so done. (Criminal Code, secs. 122, 124, 187; Gen. Stats., chap. 29, art. 6, sec. 2; Commonwealth v. Tanner, 5 Bush, 317; Commonwealth v. Turner, 8 Bush, 2; Taylor v. Commonwealth, 1 Duv., 161; Commonwealth v. Yancy, 2 Duv., 375; Wilson v. Commonwealth, 3 Bush, 105.)

Shouse v. Commonwealth.

WM. J. HENDRICK, ATTORNEY-GENERAL, FOR APPELLEE.

The question is whether or not it was necessary for the prosecutor to allege, in order to constitute a felony, that the cutting and stabbing were done *with intent to kill*. And this resolves itself into the question as to whether or not this statutory offense, unless the words "*with intent to kill*" are used, does not constitute the offense of *malicious cutting and wounding*. The court will find a full citation of authorities in the brief filed for appellant, and I submit the question for the decision of the court without further comment.

CHIEF JUSTICE BENNETT DELIVERED THE OPINION OF THE COURT.

The appellant was convicted of the crime of malicious cutting with intent to kill.

The indictment accuses the appellant "of the offense of cutting John Reffit with intent to kill him, committed in manner as follows: The said Wm. Shouse did unlawfully, willfully and feloniously cut, thrust and stab John Reffit with a knife, from which cutting and stabbing said Reffit did not die."

It is contended that it is not sufficiently charged that the appellant cut Reffit with intent to kill him. The 124th section of the Criminal Code provides: "The indictment must be direct and certain as regards—. . . 2. The offense charged. . . . 4. The particular circumstances of the offense charged, if they be necessary to constitute a complete offense."

The indictment charges that the appellant cut John Reffit with intent to kill him, committed as follows, to-wit: The appellant did said cutting unlawfully, willfully and feloniously, from which Reffit did not die. It will be seen that the indictment is direct and positive as to the offense charged and the person upon whom it was committed, and that it was done with intent to kill him. It then gives the particular circumstances of the offense charged so as to make it a case of malicious cutting. It

Eversole v. Commonwealth.

seems to us that the positive and direct charge that the appellant cut Reffit with intent to kill him having been once made, it was not necessary to repeat the same statement in giving the particular circumstances of the offense, for the Criminal Code expressly declares that the acts constituting the offense shall only be made in ordinary and concise language. The indictment charges a statutory offense.

The judgment is affirmed.

CASE 107—INDICTMENT—MAY 31.

Eversole v. Commonwealth.

APPEAL FROM CLAY CIRCUIT COURT.

95	623
105	734
95	623
118	805

1. **EVIDENCE.**—Upon the trial of appellant for murder, the court erred in permitting a witness to testify that some time after the occurrence the accused came to her house, excited and seemingly afraid of being killed, and said he was a shooting man and had killed two men, the fact that the appellant did the shooting not being questioned.
2. **INSTRUCTIONS AS TO SELF-DEFENSE.**—The court erred in instructing the jury that in order to acquit upon the ground of self-defense, they must believe the killing was necessary, or seemed to defendant in the exercise of a reasonable judgment to be necessary, in order to avert or "escape" the danger, real or apparent. The word "escape" is not proper in such an instruction under any circumstances, and is particularly improper and misleading when used in reference to a person accused of homicide, who is assaulted in his own yard and near to his own dwelling-house, as was the case here. He then may stand his ground, and is not required to flee or "escape."

JAMES EVERSOLE, A. W. BAKER AND H. C. EVERSOLE FOR APPELLANT.

1. The court erred in instructing the jury that it was the duty of appellant, when assaulted in his own home, to "escape" the danger brought on by the deceased. (Wright v. Commonwealth, 85 Ky., 123; Estep v. Commonwealth, 86 Ky., 39; Trimble v. Commonwealth, 78 Ky., 176.)

Eversole v. Commonwealth.

2. It was error to permit Mrs. Potter to testify that the defendant came to her house at night, that he was excited and said, "Don't let them kill me, I have killed two men." This testimony formed no part of the *res gestæ*. (Greenleaf on Evidence, vol. 1, p. 144, sec. 108.)

WM. J. HENDRICK, ATTORNEY-GENERAL, FOR APPELLER.

The verdict is not so manifestly against the evidence as to authorize this court to set it aside, and in the absence of any error of law affecting the substantial rights of appellant, the judgment must stand. The court carefully instructed the jury upon the law of manslaughter and self-defense.

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

Joseph Eversole was indicted for murder of John Herd, but convicted of manslaughter and sentenced to confinement in the penitentiary for twenty-one years.

It appears that Saturday, next before the killing, which occurred on Monday, Herd, accompanied by his wife, a sister of Eversole's wife, went to the house of the latter. Next day, Sunday, the two wives went to a house of religious worship, while the two husbands went to some other place in search of whisky. On their way back they stopped at the church house and met a man named Hacker, who accompanied them to the home of Eversole, the two women having preceded them. After getting dinner the three men went to a place about eight miles distant to get more whisky, and returning about 11 P. M. eat supper and went to bed, Hacker occupying a separate room, there being only two in the dwelling-house, while Eversole and wife and Herd and wife slept in the same room. Where the children slept does not appear.

A short while before daylight Herd commenced quarreling with and threatening his wife so boisterously and violently that she got out of bed and left the house. After Eversole and wife got out of bed the three sat about the fire. Herd still continued threatening his wife, and in

Eversole v. Commonwealth.

addition maligned her father, who was dead, and spoke disrespectfully of her mother. The weather being cold Eversole's wife carried a blanket to Herd's wife, who remained outside of the house through fear of her husband. But, finally, assuming he was somewhat pacified, Herd's wife came back to the house, but he again quarreled with and drew a poker with purpose to strike her, and was only prevented by Eversole's wife, who interposed for protection of her sister. At the breakfast table Herd demanded a toddy of whisky be given him, but upon failure to get it, again commenced to boisterously threaten his wife, who was still kept out of the house through fear of him. After breakfast Eversole and Hacker left the house for the purpose, as disclosed by a witness for the Commonwealth, of "getting away" from Herd. They, however, returned to Eversole's house, and after remaining a short time Eversole announced his intention of going to a place indicated to look after his hogs, and starting, was followed by Hacker and Herd. But, after proceeding a short distance, Eversole concluded to return to his home, and was again followed by Herd and Hacker. And after getting into his yard and close to his porch door the evidence of all those witnesses who were near enough to see all that occurred, shows Herd, with an open knife, demanded Eversole's pistol, at the same time springing toward him, and then Eversole fired three shots which resulted in his death.

The only cause Herd had, so far as disclosed by the evidence, for quarreling with and threatening his wife, was that she had hid the whisky, and he finally charged Eversole with conniving at and aiding her in doing so. The evidence discloses that Eversole, after breakfast bor-

Eversole v. Commonwealth.

rowed from Hacker the pistol with which the fatal wounds were inflicted; but after doing so he went away from his own home in order to avoid a conflict with Herd, and upon his return, finding him still in a quarrelsome mood, again left, evidently for the same purpose. And only after being followed by Herd up to his own door and assaulted with an open knife did he use the pistol.

The verdict in this case, as the record stands, shows the jury were either lacking in intelligence or controlled by passion and prejudice, and it is somewhat surprising the circuit judge would let such a verdict stand. For notwithstanding the deceased had acted like a brute and bully, and accused, according to evidence of those present, after twice leaving his house to avoid a collision, shot him only when assaulted in his own yard and on his way into his own house, the jury fixed his punishment by confinement in the penitentiary for the utmost length of time prescribed by statute in case of manslaughter.

The court erred in admitting the evidence of the witness, Nancy Potter, who testified that some time after the occurrence the accused came to her house, excited and seemingly afraid of being killed, and said he was a shooting man and had killed two men. Such evidence did not tend to illustrate the manner in which the homicide in question was committed, nor the motive of accused for committing it. But was calculated and no doubt did excite prejudice of the jury.

Instruction No. 4 is erroneous and prejudicial. It was proper to tell the jury to acquit the accused, Eversole, if at the time he shot and killed John Herd he believed, and had reasonable grounds to believe, he was then and there in immediate danger of death or the infliction of

Kentucky Central Railway Co. v. City of Paris.

great bodily harm at the hands of said Herd. But it was not proper to add as a further condition the jury should believe the killing was necessary, or seemed to defendant in the exercise of a reasonable judgment to be necessary, in order to avert or *escape* said danger, real, or to the defendant apparent. The word "escape" is not proper under any circumstances, and it is particularly improper and misleading when used in reference to a person accused of homicide and who is assaulted in his own yard and near to his own dwelling-house. He there may stand his ground, and is not required to flee or *escape*. He is, as well upon his own premises as elsewhere, obliged by the law to avoid taking human life when there is no real or apparent danger of then and there losing his own life or suffering great bodily harm at the hands of his assailant, but, being at his own dwelling-house, he is not required to *escape*, that is, flee further, in order to do so.

The judgment is reversed for a new trial consistent with this opinion.

CASE 108—PETITION EQUITY—JUNE 9.

Kentucky Central Railway Company v.
City of Paris.

APPEAL FROM BOURBON CIRCUIT COURT.

RAILROADS—DEDICATION OF FOOTWAY ON BRIDGE—SPECIFIC PERFORMANCE.—Where a railroad company constructed for its own use a bridge across a stream by which a town was divided, building under and attached to the main structure a footway for the public use, the company itself having no use for such a passway, there was a dedication of the footway by the railroad company to the public use; and the city having lighted up the way with gas, and by its officers caused

Kentucky Central Railway Co. v. City of Paris.

the railroad company to make repairs, and aided in constructing the approaches, there was as complete an acceptance by the city of the dedication as was compatible with the right of the owners. And the railroad company having thus maintained the footway for more than thirty years, the city has acquired the right to its use by prescription. And the railroad company having torn down the old bridge and erected a new one in its stead, leaving off and declining to rebuild the footway, in this action brought by the city for that purpose the chancellor properly required the company to restore the way. While the restoration of such an artificial way can not be directed where the structure falls from decay or is necessarily removed, yet where the deliberate agency of the owner, unaffected by the conditions mentioned, is the destroying power, the restoration may be required.

G. C. LOCKHART FOR APPELLANT.

1. Appellee does not claim that there was any undertaking or agreement on the part of appellant or its predecessors in title to maintain the footway. Such an obligation does not arise by implication of law. (Trustees of Dover v. Fox, 9 B. M., 201.)
2. The city of Paris has no standing in court to assert any claim or right based upon a dedication which it fails to allege and show was accepted by it in its corporate capacity. (Wilkins v. Barnes, &c., 79 Ky., 324; 2 Washburn on Real Property, 348.)
3. As to the claim by prescription it may be said this is an indispensable element of the claim of dedication *in pais*. (Beall v. Clore, 6 Bush, 676.)
4. Neither by dedication or prescription can active duties or the obligation to perpetually restore and maintain an artificial structure be imposed.
5. Conceding all that appellee asserts, can specific performance be decreed of a common law dedication or the acquisition by prescription of a way to the use of the public with the reservation to the grantor of the right to the control of the way? (See Nat. Stock Yards v. Wiggins Ferry Co., 112 Ill., 396; Wistar's Appeal, 80 Pa. St., 495.)

J. H. BRENT FOR APPELLEE.

1. The only real and appropriate relief in this case is an order compelling the railway to replace the bridge substantially *in specie* and *in situ*. (Story's Equity Jurisp., sec. 728; Waterman on Specific Performance, note 5 to sec. 28.)
2. A court of equity has power to grant such relief. (5 Wait's Actions and Defenses, p. 765; L. & N. R. Co. v. Zaring, 9 Ky. Law Rep., 107; Fry on Specific Performance, secs. 35, 51, 52 and 54, and note 14 to sec. 40; Wyche v. Greene, 16 Ga., 49.)

Kentucky Central Railway Co. v. City of Paris.

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

Adopting the chancellor's statement of the facts, we find that the Kentucky Central Railway Company owns and operates a line of railroad which at Paris crosses Houston Creek; and by this creek the city of Paris is divided. The railroad was constructed in 1854 or 1855, and about that time a bridge was made over the creek by the railroad company. But few citizens then resided on the north side of the creek, by far the larger part of the town being on the south side. When the bridge was built a footway was made under and attached to it. It is not shown why this footway was built, or rather no use for it by the company is shown. The public used it from the start, and that use has increased with the growth of the city. There were many desirable building sites on the north side, and now a large part of that side is built up with attractive homes. A deprivation of the right to use the footway will seriously affect the public, and particularly those citizens residing on the north side. The approaches to either end of the bridge were so made that persons might pass with facility from Main street, in South Paris, onto the footway and, crossing over, reach an avenue now known as Mt. Airy, but then an open, unimproved street or lane. The Lexington & Covington Railroad Company built the footway, and that company and the city of Paris made the approaches thereto.

Sometime in the sixties the railroad company substituted for this passway another—safer, more substantial and more adequate to the increasing uses thereof. And again, in 1871 or 1872, for that way the Kentucky Central Railroad Company, the appellant, substituted another, superior to either of the others. In about September,

Kentucky Central Railway Co. v. City of Paris.

1889, the appellant tore down the old bridge and erected a new one in its stead, leaving off and declining to rebuild the foot passway in question. This action was then brought by the city to compel the rebuilding of the passway or, if such relief could not be granted, then for judgment for the sum of \$5,000, to be used in building a way in place of the one taken down.

The judgment of the court required the restoration of the foot-bridge or passway, and the railway company has appealed.

It seems to us, upon the state of case presented, that there is more difficulty in the ascertainment of the remedy to be applied to right the wrong complained of than in determining the right to exist. It can not be doubted that the owners of the bridge provided the passway solely for the public and intended a dedication thereof to the public use. Had these owners needed the way, the use by others in passing over it might be held to have been merely permissive. The use of the way by the public and the control of it by the city indicate an acceptance as complete as was compatible with the rights of the owners. The city might not enter on the bridge and repair the way, but it did light it up with gas, and by its officers cause the railroad company to make repairs and aid in constructing the approaches. In a qualified way it had the oversight of it and did as much toward accepting the donation or dedication as it could do. It could not use it or control it in such manner as to interfere with the company's *absolute* dominion over the structure, but for such purposes as were consistent with the intentment of the dedication, it did use and control the way,

and we think for such length of time as to conclude the owners and constitute a right by *prescription*.

But while such right in or over an artificial way may be thus acquired, it is contended that when the structure falls from decay or is necessarily removed, a restoration can not be directed. This may be admitted. The law of Specific Performance may not be so applied, but when the deliberate agency of the owner, unaffected by the conditions mentioned, is the destroying power, are the courts powerless to afford redress? It can not be contended for a moment that a judgment for pecuniary compensation would have been appropriate or practicable. What is to be the measure of the compensatory damages? Manifestly the right to use the passway as it was and where it was is the peculiar element of value. The city does not own the structure, nor does the public, whose representative the city is, hence it may not go on the bridge to rebuild the footway. It seems to us, therefore, that the chancellor applied the only appropriate remedy when he directed the restoration. The doctrine that the exercise of this discretionary power on the part of the chancellor is within the recognized rules of equity is supported by abundant authority. (See Wait's Actions and Defenses, vol. 5, page 765; Fry on Specific Performance of Contracts, secs. 35, 51, 52 and 54, and notes to sec. 40; Story's Equity Jurisprudence, sec. 728; Waterman on Specific Performance, sec. 28, and L. & N. R. Co. v. Zaring, Superior Court (Bowden, J), 9 Ky. Law Rep., 107.

Wherefore the judgment is *affirmed*.

Whittaker v. Commonwealth.

CASE 109—INDICTMENT—JUNE 14.

95	632
100	152
100	201

Whittaker v. Commonwealth.

APPEAL FROM OHIO CIRCUIT COURT.

INCEST—ACCOMPLICE.— Under an indictment for incest alleged to have been committed by the defendant with his daughter the jury were authorized to convict upon the testimony of the daughter alone, as she can not be regarded as an accomplice.

E. D. GUFFY FOR APPELLANT.

The daughter of defendant was an accomplice, and a conviction can not be had upon her testimony alone. (Criminal Code, secs. 241 and 242; Gen. Stats., chap. 29, art. 4, sec. 13; Miller v. Commonwealth, 78 Ky., 15.)

W. J. HENDRICK, ATTORNEY-GENERAL, FOR APPELLEE.**JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.**

The appellant was indicted, tried and convicted for the crime of incest.

He denied his guilt, and his conviction was secured on the testimony alone of his minor daughter, the alleged victim of his lust. There was no testimony in corroboration of the daughter's, and for this reason it is insisted that the jury should have been told to acquit.

They were in effect told that they might infer the consent of the daughter to the carnal knowledge of the father, from its long continuance without complaint from her, and that if there was such consent, then the daughter was an accomplice, and they could not convict on her testimony alone, unless they believed such conviction or carnal knowledge was had by the undue influence of the accused.

This instruction was more favorable to the appellant than he was entitled to. There could be no such consent as

O'Connor & McCulloch v. Henderson Bridge Co.

to affect in any way the guilt of the accused. The crime was committed against the daughter. She was not the accomplice, but the victim of her father. If another had aided the father in the accomplishment of his purpose he would have been an accomplice, but not so with the daughter. She might have committed a crime also; indeed, did commit one, unless she is guilty of perjury, but it was not the same crime that the father committed. Their crimes are separable under the statute.

Judgment affirmed.

CASE 110—PETITION ORDINARY TRANSFERRED TO EQUITY—

JUNE 16.

O'Connor & McCulloch v. Henderson Bridge
Company.

Henderson Bridge Company v. O'Connor &
McCulloch.

95	633
c120	6

95	633
119	401

95	633
122	278

95	633
128	710
f128	714

95	633
f131	53

APPEALS FROM LOUISVILLE LAW AND EQUITY COURT.

1. **BURDEN OF PROOF—IRREGULARITY IN ORDER OF INTRODUCTION OF TESTIMONY.**—Where the court ruled that defendant had the burden of proof and should first produce its evidence, which was done, but at conclusion of the whole evidence changed its ruling so as to give plaintiffs the concluding argument to the jury, there was, in meaning of section 340 of the Civil Code, such "irregularity in the proceedings of the court" as prevented defendant having a fair trial, for while the burden of proof in the whole case was on the plaintiffs, and they would have been entitled to conclude the argument if the court had ruled them to first produce their evidence, yet in view of the large amount of complicated or contradictory testimony and the unusual length of the trial the diverse rulings mentioned were prejudicial to defendant, and the court did not err in granting it a new trial.

O'Connor & McCulloch v. Henderson Bridge Co.

2. **THE RIGHT OF TRIAL BY JURY CAN NOT BE IMPAIRED OR MODIFIED BY LEGISLATIVE ENACTMENT.** Therefore, whether this action was properly transferred from the ordinary to the equity docket depends, not upon the amendment of April 29, 1890, to section 10 of the Civil Code of Practice, but upon the proper interpretation and application of the language of section 7 of the Constitution, which provides that "the ancient mode of trial by jury shall be held sacred and the right thereof remain inviolate, subject to such modifications as may be authorized by this Constitution." But that clause of the Constitution should not be so strictly construed or rigidly adhered to as to prevent in any case due and proper administration of justice.
3. **A COURT OF EQUITY HAS CONCURRENT JURISDICTION IN MATTERS OF ACCOUNT,** which should be exercised when otherwise there may be serious doubt as to the true state of the accounts or difficulty in satisfactorily adjusting them and safely striking a balance. Therefore, although this action was brought to recover damages, yet as the criterion of recovery, as fixed by this court on a former appeal, required the consideration of various items of account as to each of which there was much contradictory evidence requiring prolix mathematical calculations in estimating values and amounts, and the special commissioner to whom the case was referred appears to have been engaged under the order of reference for the better part of nine months, the transfer of the action to equity should not be regarded a reversible error.
4. **INTEREST.**—In this action by contractors to recover of defendant bridge company damages for an illegal attempt to annul a contract made between the parties for building foundations and piers of a railroad bridge and forcibly driving plaintiffs from the work, this court having expressly held, upon a former appeal from judgment on the verdict of a jury, that plaintiffs were entitled in any event to recover fifteen per cent of amount of their earnings prior to November 30, 1883, retained by the company, the lower court erred in overruling the motion made upon return of the case from this court to have judgment rendered therefor, the amount not being disputed. And, therefore, as the contractors were entitled to judgment for that sum and interest from November 3, 1883, to December 1, 1889, when the motion was made, judgment for the aggregate of principal and interest must, upon return of the case, be entered as of the latter date, with interest therefrom.
5. **THE DEFENDANT WAS NOT ENTITLED TO ANNUL THE CONTRACT** under a clause which gave it the right to annul without notice in case the contractors did not well and truly, from time to time, comply with and perform all the terms stipulated, the defendant itself being in default by reason of failure to estimate and pay for work done and materials delivered, without which the contractors could not further comply with and perform all the terms of the contract. And, cer

O'Connor & McCulloch v. Henderson Bridge Co.

tainly, a chancellor would, under the circumstances, hold it liable for value of work done and materials and working plant.

6. THE PLAINTIFFS WERE NOT ENTITLED TO ANYTHING ON ACCOUNT OF PROSPECTIVE PROFITS, as it is manifest, in view of the ascertained cost to the company of completing the work, that the contractors would not have made any profit.
7. RESERVATION IN CONTRACT BUILDING OF RIGHT TO ANNUL.—The defendant has no cause of action against plaintiffs on account of their alleged failure to progress with the work according to an agreed programme, or failure to comply with the contract in any respect, as the remedy provided for the company in case of non-compliance with the contract by the contractors was the right to annul the contract in either one of the three conditions stated therein, and in one of them to have unpaid part of the work done forfeited.

HUMPHREY & DAVIE FOR O'CONNOR AND McCULLOCH.

1. The Bridge Company will not be heard to claim that it had the right to annul the contract on account of the contractor's delay, in view of the fact that it had itself made default in making monthly estimates of, and promptly paying for, the work as done. When the Bridge Company violated its promise to make payment, the contractor was under no duty to push the work, or put more money or labor in it; and the right of annulment ceased. (*Canal Co. v. Gordon*, 6 Wall., 561; *Faunts v. Burks*, 16 Pa. St., 469; *Grand Rapids v. Vandusen*, 29 Mich., 444; *Howard v. Delaware*, 1 Gill., 343; *Chesapeake v. Randall*, 1 Harrington, 310; *Hale v. Trout*, 35 Cal., 24; *Philips v. Construction Company*, 91 U. S., 646; *Stringtown v. Riley*, 8 Ky. Law Rep., 267.)
2. In the jury trial below, the Bridge Company asked to introduce its evidence first, and the court allowed it, over plaintiff's objection. As this gave the Bridge Company the advantage of making the first impression on the jury, and as the question of the mode of introducing evidence is largely a matter for the discretion of the court below, the verdict should not have been set aside on this account. (*Code*, sec. 317; *Montgomery v. Swindler*, 32 Ohio St. R., 225; *Andrews v. Hayden*, 88 Ky., 457.)
3. An erroneous ruling by the court below merely as to which side shall first introduce evidence, is not a ground for setting aside the verdict. (*Thompson on Trials*, sec. 344; *Geech v. Ingall*, 14 M. & W., 99; *Brandford v. Freeman*, 5 W. H. & G., 734; *Ashby v. Bates*, 15 M. & W., 589; *Blake v. Powell*, 26 Kan., 327; *Preston v. Walker*, 26 Ia., 207; *Scott v. Hull*, 8 Conn., 303; *Code*, secs. 134, 338, 756.)
4. This is distinctively a common law action, as has been recognized by the two jury trials already had, and by the former opinion of this court, remanding it for a "new trial." The order of the court below, transferring it to the equity docket, was erroneous, as depriving plain-

O'Connor & McCulloch v. Henderson Bridge Co.

tiffs of their right to trial by jury. That the evidence is voluminous, or the facts complicated, does not affect this question. (Flint River v. Roberts, 48 Am. Dec., 178; Const. of Ky., sec. 7; McMartin v. Bingham, 27 Ia., 237; Johnson v. Wallace, 7 Ohio, 392; Planters National Bank v. Batchelor, 78 Ky., 435; Meek v. McCall, 80 Ky., 373; Blight v. Alexander, 4 J. J. Mar., 96; Grace v. Park, 5 J. J. Mar., 57; Bowan v. Chase, 94 U. S., 812; Porter v. Spence, 2 Johns. Chy., 171.)

5. The legislative act of April 29, 1890, authorizing the transfer to equity of a case like this, was passed *pendente lite*, for the purpose of affecting this case; and it was unconstitutional, as to this case, as an attempted legislative interference with pending litigation. (Flint River Co. v. Roberts, 48 Am. Dec., 178; Thweat v. Bank, 81 Ky., 8; Gaines v. Gaines, 9 B. M., 295; Alison v. Harrods, 9 Bush, 248.)
6. If the case be treated as an equity case, then the amount reported by the commissioner should be affirmed by this court. In a case like this the amount due is to be arrived at by reasonable estimates, and precise itemization is not required. (Sedgwick on Damages, secs. 170, 173; Sutherland on Damages, vol 1, page 113; Blagen v. Thompson, 31 Pac., 647.)

HELM & BRUCE FOR HENDERSON BRIDGE COMPANY.

- I. The trial court properly sustained the motion for a new trial after the second verdict in favor of plaintiff, as several errors were permitted to the prejudice of defendant, as follows, to-wit:

1. The court gave plaintiffs the burden of proof and allowed their counsel to make the concluding argument to the jury, whereas the burden was properly on defendant, because if no evidence had been introduced plaintiff would have recovered a material sum, and thus defendant would have been "defeated." (Code, section 526.) Where the burden is on the defendant on the issue as to the *cause of action*, it will not be given to plaintiff because he has to introduce proof of damage. (L. & N. R. Co. v. Brown, 13 Bush, 478.) Where A is in possession of property and B *forcibly ejects him*, thus requiring A to bring a suit to recover possession or damages for the forcible eviction, the burden of proof as to right of possession is on B, the defendant. (Sowder v. McMillan, 4 Dana, 462-3; Ratcliffe v. Bellfontaine Iron Works, 87 Ky., 562.)

2. Even assuming the burden of proof was properly on plaintiffs, yet the court first ruled that it was on defendant, and its evidence was accordingly introduced first; then, after a very long trial, including a three weeks' adjournment for Christmas, the court changed its ruling and gave the concluding argument before the jury to plaintiff's counsel. This was an "irregularity in the proceedings of the court . . . by which the party (defendant) was prevented from having a fair trial" within the meaning of section 340, subsection 1 of the Civil

Code, the manifest purpose of which Code provision is to give to the trial court that scope and discretion referred to in *Houston v. Kidwell*, 83 Ky., 304, to enable it to grant a new trial whenever anything has occurred during the course of the trial on account of which the lower court thinks a fair trial has not been had. (See also *Mahan v. Jane*, 2 Bibb, 83.)

3. The court admitted incompetent testimony to the effect that before the contract was made, officers of the defendant company had expressed the opinion that there was a profit in the contract. This was not competent on the ground of being expert testimony, because that can not be proved by hearsay. (*People v. Millard*, 53 Mich., 63.) Nor was it competent as an "admission," because an admission, to be competent, must relate to a *present or past state of facts*, and not be an opinion as to future events (2 Wharton on Evidence, section 1076); nor was it competent for the purpose of contradicting the company's officers as witnesses, because they had not been examined as to the statements imputed to them (Code, section 598). And the court also admitted incompetent testimony to the effect that the engineer of the defendant company had formerly been the engineer of construction of a different work, and had conducted it regardless of economy.

It is impossible to tell what effect incompetent testimony may have had on the jury, and for error in admitting it a new trial was properly granted. (*Daniel v. Nelson*, 10 B. Mon., 317.)

- II. The court, after setting aside the second verdict, properly transferred the case to equity and referred it to a commissioner, because it involved a consideration of such a multitude of facts and complicated accounts that no jury could intelligently determine it; and the remedy at law was therefore totally inadequate, and the justice of the case could not appear.

In such a case a transfer to equity is proper. (1 Story's Eq., secs. 442, 451, 457; *Fowle v. Lawrason*, 5 Pet., 495; *Porter v. Spencer*, 2 Johns. Chy., 169; *Board of Supervisors of Dane County v. Dunning*, 20 Wis., 216; *Darthey v. Clemens*, 6 Beavan, 169; *Breckinridge v. Brooks*, 2 A. K. Marshall, 335; *Power v. Reeder*, 9 Dana, 6; *Neal v. Keel*, 4 Monroe, 162.)

The cases of *Bachelor v. Planters' National Bank*, 78 Ky.; *McMartin v. Bingham*, 27 Iowa; *Smith v. Brown*, 3 How. Pr., 809; *Swift v. Wells*, 2 How. Pr., 78, and *Sharp v. Mayor*, 18 How. Pr., 213, do not militate against the proposition above asserted.

The Kentucky statute authorizing transfers to equity where the case involves accounts so complicated or such details of facts as to render it impracticable for a jury to intelligently try the case (1st Acts 1889-90, p. 115) is constitutional; but the transfer in such a state of case could be made independently of the statute.

- III. The contract sued on by plaintiffs was lawfully annulled by defendant, because plaintiffs failed to progress with the work with sufficient

O'Connor & McCulloch v. Henderson Bridge Co.

speed to complete it within a reasonable time after the contract time was abrogated (*Henderson Bridge Co. v. O'Connor & McCulloch*, 88 Ky., 328). In fact they practically abandoned the work by refusing, in effect, to proceed unless conditions not authorized by the contract were acceded to.

- IV. The amounts fixed by the judgment of the lower court, if the plaintiffs are entitled to any recovery at all, were fixed according to the principles settled by this court on the first appeal and should not be disturbed. But defendant having lawfully annulled the contract sued on, on account of plaintiff's defaults, was damaged to a greater extent than the amounts allowed plaintiffs in the judgment, and therefore the judgment should have been in favor of defendant on its counterclaim.

SAME COUNSEL IN PETITION FOR REHEARING.

- I. The amounts allowed plaintiffs by the commissioner and adopted by this court on the second appeal were fixed in violation of the principles fixed by this court on the first appeal, which principles constitute the settled law of this case, whether right or wrong.
- II. A motion for judgment for any part of a claim, as uncontroverted, can never be sustained when there is a counterclaim in the case for an amount exceeding the amount of plaintiff's claim, which is otherwise uncontroverted.
- III. Where both parties appeal from a judgment, one party superseding it, and the judgment is reversed on the appeal of either, no damages can be allowed on the supersedeas bond, for it can not be said that the judgment has been affirmed, though no error may have been found to the prejudice of the party superseding. (*Wade v. First National Bank of Franklin*, 11 Bush, 701; *L. & N. R. Co. v. Earl's Adm'r*, 94 Ky., 368.

JUDGE LEWIS DELIVERED THE OPINION OF THE COURT.

This action was instituted in August, 1884, by O'Connor & McCulloch to recover of Henderson Bridge Company damages for an illegal attempt to annul a contract made in December, 1881, between the parties for building foundations and piers of a railroad bridge across Ohio river at Henderson, and forcibly driving plaintiffs from the work while engaged at it.

Upon trial of the case in December, 1886, the jury found a verdict in favor of plaintiffs for \$86,805.73 and

interest thereon from April 9, 1884, when they were forced to quit the undertaking. But upon appeal this court, for errors of law alone, and without determining issues of fact involved, reversed the judgment rendered in pursuance of that verdict and remanded the case for new trial. (Sec. 88, Ky., 303.) January 24, 1890, another jury found a verdict in favor of plaintiffs for \$148,633.61, being principal sum and interest thereon to that date. But upon motion and grounds filed the lower court, September 29, 1890, set aside that verdict and ordered a new trial. On this same day, however, an order was made transferring the case to equity; and subsequently the chancellor referred it to a special commissioner to inquire and report as to matters specifically mentioned in the order of reference, being governed by stenographic record of evidence heard and instructions given on the preceding jury trial.

November 30, 1891, the commissioner reported as his conclusion from evidence and instructions that plaintiffs were entitled to recover the principal sum of \$104,427.88 and interest to that date, making an aggregate of \$153,168.51. But exceptions to the report were sustained to the extent of reducing the principal sum to \$61,536.55, for which, with interest from April 7, 1892, judgment was, July 7, 1892, rendered.

Both plaintiffs and defendants have appealed from that judgment—the latter superseding it. It is contended, in behalf of the former, that not only the judgment but also the order setting aside the verdict of January 24, 1890, should be reversed, effect of which would be revival of the verdict and entry of judgment for amount of it. But, it seems to us, the lower court did not err in setting

O'Connor & McCulloch v. Henderson Bridge Co.

aside the verdict and granting a new trial. For, without referring to other grounds filed, the order of proceeding in the trial was directly contrary to subsection 3, sec. 817, Civil Code, which provides that "the party on whom rests the burthen of proof in the whole action must first produce his evidence; the adverse party will then produce his evidence." For the court first ruled that defendant had the burthen of proof and should first produce its evidence, which was done, but at conclusion of the whole evidence changed its ruling so as to give plaintiffs benefit of concluding the argument to the jury.

We think the burthen of proof in this whole case was on plaintiffs, and there could be no question of their right to conclude the argument, nor any ground of complaint by defendant it was awarded to them, if the court had, as required by the Civil Code, ruled them to first produce their evidence. But, in view of the very large amount of complicated and contradictory testimony produced by the respective parties, and unusual length of the trial, diverse rulings mentioned must be regarded as in meaning of section 340, such "irregularity in the proceedings of the court" as prevented defendant having a fair trial. For it appears that after defendant had produced its evidence, which required the time from December 12th, when the trial began, to 19th, and two days had been used by plaintiffs, the court took a recess for about twenty-four days—the jury being in the meantime dispersed. So that on January 17, 1890, when plaintiffs' evidence, that had consumed the three preceding days, was concluded, it had been more than three weeks, and when the verdict was rendered, January 24th, it had been more than a month since any of defendant's evidence in

chief was heard by the jury. To force a party, under such circumstances, to first produce his evidence, and yet deprive him of benefit of concluding argument to the jury, which is of great advantage in such a case as this, is not giving him a fair trial.

Though counsel for plaintiffs below contend it was error to sustain exceptions to report of the special commissioner, the principal reason urged in argument for reversal of the judgment is that the chancellor has no jurisdiction, the order transferring the action to equity being in violation of section 8, article 13 of the old (which is the same as section 7 of the present) Constitution, as follows: "The ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate, subject to such modifications as may be authorized by this Constitution."

If the judgment should be reversed on that ground, the whole proceeding in equity would have to be disregarded and mandate go for another and third trial by jury. It is, therefore, necessary to now consider and determine the question of jurisdiction. To sustain the order transferring the action to equity, counsel for defendant below refer to the following statute, passed April 29, 1890: "That section 10 of the Civil Code of Practice be, and the same is here, amended as follows: The court may, in its discretion, on motion of either party, or without motion, order the transfer of an action from the ordinary to the equity docket, or from a court of purely common law to a court of purely equity jurisdiction, whenever the court before which the action is pending shall be of the opinion that such transfer is necessary because of the peculiar questions involved, or because the

O'Connor & McCulloch v. Henderson Bridge Co.

case involves accounts so complicated or of such great detail of facts as render it impracticable for a jury to intelligently try the case."

If the court was, at date of that statute, without authority to transfer an action from the ordinary to equity docket under circumstances and for causes therein recited, it is still powerless in that respect, for the right of trial by jury can not be impaired or modified by legislative enactment. Therefore, whether this action was properly transferred depends not upon that statute, but proper interpretation and application of the language of the clause of the Constitution quoted.

That clause never was intended to be so strictly construed or rigidly adhered to as to prevent, in any case, due and proper administration of justice. Accordingly, as said in Story's Equity, vol. 1, sec. 442, "courts of equity have, for a long time, exercised a general jurisdiction in all cases of mutual accounts upon the ground of the inadequacy of the remedy at law." And in section 451 is this language: "Lord Redesdale has justly said that in a complicated account a court of law would be incompetent to examine it at *nisi prius* with all the necessary accuracy. This is the principle on which courts of equity constantly act by taking cognizance of matters which, though cognizable at law, are yet so involved with complex accounts that it can not be properly taken at law; and until the result of the account is known the justice of the case can not appear."

This court has uniformly held that a court of equity has concurrent jurisdiction in matters of account and "should be exercised when otherwise there may be serious doubt as to the true state of the accounts, or difficulty in

satisfactorily adjusting them, and safely striking a balance." (Breckinridge v. Brooks, 2 A. K. M., 335; Bruce v. Burdet, 1 J. J. M., 80; Power v. Reeder, 9 Dana, 6.)

But in every case of interposition of a court of equity in such actions there must exist a necessity arising from failure of remedy at law to afford justice. And extent of equitable jurisdiction in actions for an accounting and when to be exercised is thus stated in Pomeroy's Equity Jurisprudence, sec. 1421: "The instances in which the legal remedies are held to be inadequate and, therefore, a suit in equity for an accounting proper, are: 1. Where there are mutual accounts between the plaintiff and the defendant—that is, where each of the parties has received and paid on account of the other. 2. Where the accounts are all on one side but there are circumstances of great complication or difficulties in the way of adequate relief at law. 3. Where a fiduciary relation exists between the parties, and a duty rests on the defendant to render an account."

Though this action was brought to recover damages, the criterion of recovery by the contractors was held in former opinion to have been fixed in the contract as follows: "First, the value of such of their derrick-tools and other plant as were in use at the time, not already paid for; second, the value of the materials then on hand or delivered or ready for delivery subsequent to November 30, 1883; third, the reasonable value of unestimated work done after that date; fourth, the amount of 15 per cent earnings retained, the last two items to be paid for in any event; fifth, interest on whole amount from April 9, 1884; sixth, whatever profits it may be shown

O'Connor & McCulloch v. Henderson Bridge Co.

could have been made, if appellees had been permitted to complete the work."

There is controversy between the parties as to each of these subjects, except amount of earnings retained. A great deal of evidence was produced, much of it contradictory, and prolix mathematical calculations made in estimating values and amounts, about which there was great difference between witnesses. The special commissioner appears to have been engaged under the order of reference for better part of nine months, and how tedious and difficult it was for him to reach a conclusion, the following sworn statement he made shows: "I have been practicing as an attorney-at-law since 1866, and had considerable experience in settlement suits, but have never been engaged as attorney or commissioner in one with more complications, or which required greater labor to understand and report on intelligently than this."

Although, as it turned out there was not, considering amount involved, a great difference between the principal sum found due the contractors by the special commissioner and what was found by the second jury, still transfer of the action to equity should not be regarded a reversible error.

The action being then properly in equity the next inquiry is whether the chancellor rendered judgment for the correct amount?

In the former opinion of this court it was expressly held that the contractors were, in any event, entitled to recover 15 per cent of amount of their earnings prior to November 30, 1883, retained by the company, amount of which the record shows is \$33,760.24. And the lower court erred in overruling the motion made upon return

of the case from this court to have judgment rendered therefor. For as the amount was not disputed, and right to it had been determined, section 380, Civil Code, applied, being as follows :

“If only a part of a claim be controverted, judgment may, at any time, be rendered for the part not controverted.” As, therefore, the contractors were entitled to judgment for that sum, and interest from November 3, 1883, to December 1, 1889, when the motion was made, judgment for the aggregate of principal and interest must, upon return of the case, be entered as of the latter date therefor, and bearing interest therefrom. According to the former opinion recovery for value of derrick-tools and other plant, of materials on hand, and for whatever profit the contractors could have made, if permitted to complete the work, depends upon whether the annulment of the contract, attempted by the company in February, 1884, and consummated by force April 9, 1884, was lawful. We will, therefore, first determine that question.

By terms of the contract the company had the right to annul by giving the contractors one month's notice; but in that case the latter would have had the unconditional right to payment in full for all materials delivered, work done, and derrick-tools or other working plant. But the company undertook to annul under that clause of the contract which authorized it arbitrarily done when it appeared to its engineer the work did not progress *with sufficient speed or in a proper manner*, to be followed by forfeiture of the unpaid part of the value of the work done by the contractors. In the former opinion, however, it was held the forfeiture had been waived and lost. The precise

O'Connor & McCulloch v. Henderson Bridge Co.

question now is, whether the right to annul without notice existed under another clause which authorized it in case the contractors did not well and truly from time to time comply with and perform all the terms stipulated. As a question of fact, under instructions as to the law applicable, both juries and the special commissioner have found the right to annul at the time and in the manner attempted did not exist. Besides, upon reconsideration, we think that as the company was in default by reason of failure to estimate and pay for work done and materials delivered, without which the contractors could not further comply with and perform all the terms of the contract, it had no right to annul. Certainly a chancellor would, under the circumstances, hold it liable for value of work done and materials and working plant. The special commissioner reported the value of material delivered and work done subsequent to November 30, 1883, that had not, as required by the contract, been estimated or paid for, including the plant at a stone-quarry, to be \$36,909.15. The chancellor valued the same at only \$6,886.00. The commissioner reported amount of profit the contractors would have made, if permitted to complete the work, at \$33,758.00. The chancellor was of opinion no profit would have been made. The commissioner reported the whole amount due to the contractors, including \$33,760.24, amount of earnings retained by the company, to be \$104,437.39, bearing interest from April 9, 1884. The chancellor fixed the principal sum, including percentage of earnings retained, at \$61,536.55, not bearing interest, however, until April 9, 1892.

In our opinion the evidence does not satisfactorily show the contractors would have made any profit, which at

best is conjectural. The contract price of the whole work was \$562,632.00. The entire outlay by the company that undertook to complete the bridge after annulling the contract, was about \$145,000.00 in excess of that sum, without including estimates for work done and materials furnished subsequent to November 30, 1883, which are subjects of the present litigation. It seems to us incredible, in view of the actual and ascertained cost to the company, that the contractors could or would have made any profit if permitted to complete the work.

But, leaving out of view the matter of profit, the principal sum found by the commissioners is less by about \$15,000.00 than that found by the first jury, that does not appear to have estimated any profit, and about \$8,000.00 less than what was found by the second jury, that does appear to have estimated the profit. But considering the time fixed by the chancellor for interest to begin running, his judgment is for less than half what the verdict of either jury would now amount to, and about \$45,000.00 less than the commissioner reported.

It is apparent only approximate value and amount of work and materials for which the company is required to pay the contractors can be ascertained, because witnesses differ not only in their estimates and calculations, but as to facts of which they profess to have personal knowledge. But, without going into detail, we are satisfied the chancellor underestimates the amount to which the contractors are entitled, and his conclusion can not be adopted unless, without good reason, we disregard not only the finding of each jury, but also report of the special commissioner, who has shown marked capacity as both accountant and lawyer, and devoted very much

more time and attention to the investigation than can be expected or required of the judge of a court.

We therefore think his report ought to have been confirmed, except as respects amount allowed the contractors for possible profit; in that he is in error. And upon return of the case judgment must be entered in favor of the contractors as of July 7, 1892, for \$36,909.15, with interest from April 9, 1884, to that date, value of work and materials subsequent to November 30, 1883, as well as judgment for percentage of earnings retained as before and in the mode directed.

In our opinion, Henderson Bridge Company has no cause of action against O'Connor & McCulloch by reason of their alleged failure to progress with the work according to an agreed programme, or failure to comply with the contract in any respect. The remedy provided for the company in case of non-compliance with the contract by the contractors, and manifestly the only remedy contemplated by the parties, was the right to annul the contract in either one of the three conditions stated therein, and in one of them to have unpaid part of the earnings forfeited.

Wherefore, on appeal by plaintiff below, the judgment is reversed and case remanded for proceedings consistent with this opinion. And, on appeal by defendants below, the judgment is affirmed with damages.

To a petition for rehearing filed by counsel for Henderson Bridge Company, Judge Lewis delivered the following response of the court:

It having been found by two juries and the special commissioner acting under instructions of court, and not

only adjudged by the lower court at each trial by jury and of exceptions to report of the commissioner, but finally determined by this court, that Henderson Bridge Company had no right to annul the contract without notice, as it did forcibly do, the only subject for inquiry from beginning of this litigation has been as to amount of recovery the contractors were entitled to.

In the first opinion of this court it was distinctly determined the contractors were entitled unconditionally to amount of earnings retained, being 15 per cent. In the opinion, which the company now seeks to have reconsidered or modified, it was determined the contractors were not entitled to recover any sum on account of possible and contemplated profits on the work; and to that extent judgment of the lower court was concurred in, and finding of the commissioner disallowed.

It thus follows that the main question before this court, one of fact, is whether value of tools and implements on hand April 9, 1884, not already paid for, of materials delivered or ready for delivery subsequent to November 30, 1883, and of unestimated work done after that date, as found and reported by the special commissioner to be \$36,909.15, should be accepted or discarded to the extent it was done by the lower court.

For reasons stated in the opinion, that estimate was adopted instead of the one made by the lower court. No argument or suggestion is made in the petition for rehearing that was not contained in the voluminous brief on the same subject that was duly considered. There have been in this case two jury trials, the verdict in each being for more than the company will have to pay under mandate of this court, and not only upon its motion was

each verdict set aside or new trial granted, but the action was transferred to equity. It should, therefore, now be required to stand by finding of the special commissioner, made upon a third trial of the same facts, at least to the extent determined in the opinion of this court, and thereby terminate litigation begun more than ten years ago.

As expressly decided by this court, the contractors were, November 30, 1888, entitled to the 15 per cent of earnings retained by the company, and judgment ought to have been rendered for amount thereof, about which there was no dispute, including interest that had been running six years, when the motion was made December 4, 1889. There was no controversy on the subject at that time, nor room for any; for the question of the company's right to maintain a counter-claim had been previously determined against it, and the motion to file the same pleading was not then made, nor ought it to have been sustained when it was made.

Section 757, Civil Code, as amended March 24, 1888, provides: "When a party recovers judgment for only part of the demand or property he sues for, the enforcement of such judgment shall not prevent him from prosecuting an appeal therefrom as to so much of the demand or property sued for that he did not recover." So that the contractors were entitled to an execution upon the judgment of the lower court for \$61,536.55, at the same time prosecuting an appeal therefrom as to so much of the demand sued for that they did not recover. But the company prevented them obtaining an execution and thereby collecting amount of the judgment by a separate appeal and execution of a supersedeas bond, whereby it covenanted to pay to the contractors, appellees, all costs

 Geo. T. Stagg Co., &c., v. E. H. Taylor, Jr., & Sons.

and damages adjudged against appellants on that appeal and also satisfy the judgment appealed from, if affirmed. The decision of this court was that on the appeal of the contractors they did not recover all the demand sued for they were entitled to, and that the judgment *pro tanto* be reversed. But upon appeal of the company the judgment had to be necessarily affirmed, because it was not erroneous to its prejudice. And, as a consequence, under section 764, 10 per cent damages on amount of the judgment superseded has to be awarded.

Petition for rehearing overruled.

 CASE 111.—PETITION EQUITY—JUNE 16.

Geo. T. Stagg Company, &c., v. E. H. Taylor, Jr., & Sons.

APPEAL FROM FRANKLIN CIRCUIT COURT.

1. **TRADE-MARK.**—Where a corporation, doing business under the corporate name of E. H. Taylor, Jr., Co., operated two distilleries, known as the "O. F. C." and "Carlisle" distilleries, and upon the product of the former distillery a brand was used consisting of the letters and words "O. F. C., Hand-made Sour Mash Whisky, E. H. Taylor, Jr., Distiller," and upon the product of the latter a brand consisting of the words "Carlisle Standard Sour Mash Whisky, E. H. Taylor, Jr., Co., Distiller," the essential feature of the trade-mark in the one case was the letters "O. F. C.," and in the other the word "Carlisle," as the words "Hand-made" and "Standard Sour Mash Whisky" were not intended as a part of the trade-mark, even if they could have been so used, and for the name of the distiller in the brand there was to be substituted, as we must suppose, the name of the person of whom it could be truthfully said he was the distiller. And the subsequent use as an adjunct to these brands of the *fac simile* of the signature of E. H. Taylor, Jr., sometimes with and sometimes without the addition of the word "company," can not be regarded as making that signature a part of the trade-mark, E. H. Taylor, Jr., receiving no compensa-

95	651
113	715
118	717
95	651
124	177

Geo. T. Stagg Co., &c., v. E. H. Taylor, Jr., & Sons.

- tion therefor; and upon the withdrawal of E. H. Taylor, Jr., from the corporation, the corporation had no right to use his autograph signature or to advertise him as the distiller of whisky thereafter manufactured, there being no sale by Taylor to the company of the right to use his signature, and it being doubtful whether such a use could have been made of this autograph if it had been in express terms transferred, such a use of another's autograph being a fraud upon the public.
2. **SAME.**—The statement in the registration of a trade-mark that certain words of the brand may be omitted shows that they are not regarded as a part of the trade-mark.
 3. **SAME—RIGHT TO ACCOUNT OF PROFITS.**—While the defendants were properly enjoined from using the name of Taylor as a part of their trade-mark and from advertising their whiskies as "Taylor" or "Old Taylor," the plaintiffs are not entitled to an account of profits, as the defendants acted under color at least of title and conveyance from Taylor and without any fraudulent intent, the use of the name of E. H. Taylor, Jr., and his autograph being in the nature of a license or permit, which has not been abused or extended unreasonably.
 4. **PURCHASE BY ONE STOCKHOLDER OF ALL THE STOCK OF A CORPORATION.**—The withdrawal of E. H. Taylor, Jr., from the E. H. Taylor, Jr., Company, and the purchase of all the stock of that corporation by a single stockholder, suspended the existence of the corporation so far as the public was concerned, and therefore E. H. Taylor, Jr., did not violate any of the legal rights of the sole stockholder of that corporation, who continued to operate the "O. F. C." and "Carlisle" distilleries, by assuming in connection with his sons in the operation of another distillery the partnership name of E. H. Taylor, Jr., & Sons, although similar in appearance to the corporate name of "E. H. Taylor, Jr., Co."
 5. **FINAL ORDER.**—An order of reference to a commissioner, with directions to take an account of profits, was merely interlocutory.

HUMPHREY & DAVIE FOR APPELLANTS.

1. E. H. Taylor, Jr., having, for valuable consideration, united in forming a corporation to exist for twenty-five years, under the corporate name of "The E. H. Taylor, Jr., Company," thereby debarred himself from using his own name, during the existence of the corporation, in such a form as to confuse the trade of the corporation. (*Haydon Co. v. Haydon*, 9 Am. Rep., 324 (87 Conn., 238); *Frazier v. Frazier Co.*, 2 Am. St. Rep., 73 (121 Ill., 147); *Russia Cement Co. v. LePage*, 9 Am. St. Rep., 685 (147 Mass., 206); *Symonds v. Jones*, 17 Am. St. Rep. 485 (82 Maine, 302).)
2. The contracts, acts and conduct of Taylor were such as to vest in the E. H. Taylor, Jr., Co., while making the same goods at the same distillery, the exclusive right to use the name of "Old Taylor" and

Geo. T. Stagg Co., &c., v. E. H. Taylor, Jr., & Sons.

- "Taylor" on said whisky, and to debar Taylor from using any similar name or brands. (Brown Co. v. Meyer, 139 U. S., 540; Kidd v. Johnson, 100 U. S., 666; Dant v. Head, 90 Ky., 256; Mattingly v. Stone, 12 Ky. Law Rep., 76; Hoxie v. Chaney, 58 Am. Rep., 149; Dixon Crucible Co. v. Guggenheim, 2 Brewster (Pa.) 321; Cox's Am. Trade-mark Cases, 559; Sebastian on Trade-marks; Gillis v. Hall, Cox's Am. Trade-mark Cases, 598; Solis Cigar Co. v. Pose, 26 Pac. Rep., 558; Pepper v. Labrot, 3 Ky. Law Rep., 141.)
3. The script signature of "E. H. Taylor, Jr., Co." in the handwriting of Taylor was adopted by the company, with his consent, as its trade-mark signature. It thus became a lawful trade-mark of the company; and Taylor could not afterward infringe it by adopting a similar script trade-mark for his firm. (Compere v. Bajou, 2 Brewster (Pa.), 321; Cox's Am. Trade-mark Cases, 568; Browne on Trade-marks, sec. 209; Jennings v. Johnson, 37 Fed. Rep., 864; Browne on Trade-marks, secs. 180, 207.)
 4. The fact that the E. H. Taylor, Jr., Co. transferred the distillery and trade-marks to the Geo. T. Stagg Co. for a year or two, and then received them back by a re-transfer, did not, in any manner, forfeit the right to those brands, or abandon them to the use of Taylor or the public. (Glen v. Hall, 61 New York, 234; Christy v. Murphy, 12 How. Pr. R., 77; Julien v. Hoosier Co., 78 Ind., 413; Blakeman's Case, 13 Blatchford, 400; Mattingly v. Stone, 12 Ky. Law Rep., 76.)
 5. Taylor's conduct in using these names, brands and the script signature was not only a wrong to the E. H. Taylor, Jr., Co., but was also a wrong to each owner of the whisky made by that company and bearing those brands, and Stagg, as the owner of a large amount of the whisky made by the company while Taylor was with it, has the right to enjoin Taylor from diminishing its value by using its brands on other whisky. (High on Injunctions, 3d ed., sec. 1102; Walton v. Crowley, 3 Blatchford, 440; Browne on Trade-marks, sec. 63.)
 6. There should be no allowance of damages, nor an account of profits, in this case; first, because, even if Stagg had no right to the profits, they would belong to the E. H. Taylor, Jr., Company, and not to E. H. Taylor; secondly, because the brands were used under contracts and deeds and assignments from Taylor himself, and without any fraudulent intent, under the bona fide belief that the company had the right to continue their use; thirdly, because, while Taylor began his new firm of E. H. Taylor, Jr., & Sons, in 1887, he acquiesced in the right of the company to use the brands for a year or two after that, without complaint; fourthly, it is not shown that Taylor's firm could have made or sold this "O. F. C." and "Carlisle" whisky, which the company made, and on which he now claims the profits; and, fifthly, the delay, acquiescence and consent of Taylor, from 1879 to October, 1889, before suing, will prevent a court of equity from giving dam-

Geo. T. Stagg Co., &c., v. E. H. Taylor, Jr., & Sons.

ages or profits. (*MacLean v. Fleming*, 96 U. S., 257; *Harrison v. Taylor*, Cox's Am. Trade-mark Cases, 675 (11 Jurist, U. S., 408); *Beard v. Turner*, Cox's Am. Trade-mark Cases, 717; *Estcourt v. Estcourt*, L. R., 10 Chy. App., 280; *Sawyer v. Kellogg*, 9 Fed. Rep., 602.)

D. W. LINDSEY AND JOHN W. RODMAN, ON SAME SIDE.

1. The corporation "E. H. Taylor, Jr., Co.," did not cease to exist when Stagg became the sole owner of the stock. (Gen. Stats., chap. 56, secs. 8, 12; *Morawetz on Private Corporations*, secs. 638, 634, 635, 636, 637; *Russell v. McLellan*, 14 Pick., 69; *Newton Mfg. Co. v. White*, 42 Ga., 148.)
2. Whether there has been a forfeiture of the charter or an extinction of the company, can only be determined by a direct proceeding for that purpose, and not collaterally. (2 Kent, 312; *Bank of Gallipolis v. Trimble, &c.*, 6 B. M., 601; Gen. Stats., chap. 56, secs. 17 and 18.)
3. A trade-mark defined (*Shaver v. Shaver*, 37 Am. Rep., 194; *Metcalf v. Brand*, 86 Ky., 331; 12 Am. St. Rep., 730, note citing *Schneider v. Williams*, 44 N. J. Eq., 391; *Browne on Trade-marks*, sec. 52.)
4. If the other parts of the brand are to be eliminated so must the letters "O. F. C.," for the authorities are that "Old Fashioned Copper" or "Old Fire Copper," or letters standing for the same, can not of themselves constitute a legal trade-mark—that such letters as a symbol can only constitute a trade-mark when coupled with the name of the manufacturer. (*Fulton v. Sellers*, Cox's Manual Trade-mark Cases, 279.)
5. The words "E. H. Taylor, Jr., Distiller" were never used upon any whisky other than such as was manufactured at the O. F. C. distillery when Taylor was connected with the E. H. Taylor, Jr., Co., and the right to use it upon such whisky can not be successfully questioned. (*Mattingly v. Stone*, 12 Ky. Law Rep., 75; 41 Fed. Rep., 214; 24 Barb., 163.)
6. The script signature, "E. H. Taylor, Jr., Co.," became a trade-mark. (*McAndrews v. Bassett*, 4 DeGex, 380; *Leather Co. v. Leather Co.*, 4 DeGex, 142; 12 Am. Stat. Rep., 730, note; *Browne on Trade-marks*, sec. 52.)

Having the lawful right to this corporate name the company could use it for any legitimate purpose, and is entitled to protection in its use. (*Holmes, Booth & Haydon v. The Holmes, Booth & Atwood Co.*, 9 Am. Rep., 324; *Newby v. Oregon Cen. Ry. Co.*, 1 Deady, 609.)

7. One parts with the right to use his own name as a trade-mark, or name, when having permitted it to be used as part of a trade name or mark of a partnership of which he was a member, the partnership sell their business and the right to use the trade-marks belonging to or used by

Geo. T. Stagg Co., &c., v. E. H. Taylor, Jr., & Sons.

- the partnership. (*Miller v. Cummins*, MS. Op., June 19, 1884; *Burry v. Bedford*, 10 Jurist, new series, 503; *Hoxie v. Chaney*, 58 Am. Rep., 148; *Russia Cement Co. v. La Page*, 9 Am. St. Rep., 685.)
8. As Taylor sold to Stagg and the "E. H. Taylor, Jr., Co." for a valuable consideration all interests whatsoever he had in and to the effects and business of the company, he made a fair sale of the good will, which includes the firm or corporation name. (*Benninger v. Clark*, 10 Abb. Pr. U. S., 264; *Menendez v. Holt*, 128 U. S., 522; *Meny v. Hoopes, &c.*, 111 N. Y., 416; *Kinney Tobacco v. Maller*, 53 Hun, 340; *Banks v. Gibson*, 34 Beav., 566.)
 9. When a trade-mark is affixed to articles manufactured at a particular establishment, and acquires a special reputation in connection with the place of manufacture, and that establishment is transferred, either by contract or operation of law, to others, the right to the use of the trade-mark may be lawfully transferred with it. Its subsequent use by the person to whom the establishment is transferred is considered as only indicating that the goods to which it is affixed are manufactured at the same place and are of the same character as those to which the mark was attached by its original designer. (*Kidd v. Johnson*, 100 U. S., 617; *Burton v. Stratton*, 12 Fed. Rep., 696; *Pepper v. Labrot*, 8 Fed. Rep., 29; *Skinner v. Oates*, 10 Mo. App., 45; *Hoxie v. Chaney*, 58 Am. Rep., 149; *Dant v. Head*, 12 Ky. Law Rep., 154; *Mattingly v. Stone*, 12 Ky. Law Rep., 73; *Compere v. Bajou*, Upton on Trade-marks, p. 83; *Burry v. Bedford*, 4 DeGex, 351; *Cummins v. Miller*, MS. Op., June 19, 1884; *Hazzard v. Caswell*, 45 Am. Rep., 198; *Fulton v. Sellers*, Cox's Trade-mark Cases, 279; *Brown Chemical Co. v. Meyer & Co.*, Op. U. S. Sup. Ct., delivered April 6, 1891; *Jennings v. Johnson*, 37 Fed. Rep., 364.)
 10. To entitle the plaintiffs to relief they must show that they come into court with clean hands. (*Parlett v. Guggenheimer*, 1 Am. St. Rep., 416; 12 Am. St. Rep., 730, note; *McAndrews v. Bassett*, 4 DeGex, 380; *Metcalfe v. Brand*, 86 Ky., 331.)
 11. Upon the counterclaim of appellants the court below erred in not restraining appellees from the use of their infringing brand. (*Lemoin v. Blanton*, 2 E. D. Smith, 343; *Mattingly v. Stone*, 12 Ky. Law Rep., 75; *Leather Cloth Co. v. Leather Cloth Co.*, 4 DeGex, 188; *Browne on Trade-marks*, sec. 63.)

GEO. C. DRANE FOR APPELLEES.

1. The use of the name and autograph of E. H. Taylor, Jr., by the E. H. Taylor, Jr., Co., in and upon brands, signs, etc., and in advertisements, whilst he was a member of or connected with said company, was intended to signify, and was understood by the public to signify, that the whiskies made at their distilleries and sold and offered for sale by

Geo. T. Stagg Co., &c., v. E. H. Taylor, Jr., & Sons.

said company were manufactured under his especial supervision, and possessed a quality and merit which his well-known skill and integrity had given to them.

2. The right to so use his name and autograph was never, at any time, transferred, surrendered or relinquished by Taylor to Stagg or the E. H. Taylor, Jr., Co.; but was so used by said company whilst Taylor was connected with or interested in its business, by his permission and without consideration therefor.
3. The permission to use Taylor's name and autograph, having been gratuitous, was a mere license, revocable at Taylor's will and pleasure. (Browne on Trade-marks, 364, 528; 4 Lawson's Rights and Remedies, sec. 1648; 2 Parsons on Contracts, marg'l page 257, c. c., note t; Kidd v. Johnson, 100 U. S., 617; McCardell v. Peck, 28 How. Pr., 120.)
4. The right to so use Taylor's name and autograph could not continue or exist in E. H. Taylor, Jr., Co., after he had parted with or ceased to hold his interest in the business in connection with which it had been theretofore used. He could not transfer, nor could the company acquire, the right to use Taylor's name or autograph, in any way, to represent that the whisky made at their distilleries, at a time when he was not connected with nor interested in their business, was manufactured by Taylor or under his especial supervision. (Browne on Trade-marks, secs. 57, 437; 2 Parsons on Contracts, 7th ed., marg'l page 257; Skinner v. Oakes, 10 Mo. App., 215; Oakes v. Tonsmierre, 4 Wood (U. S.), 555; Symonds v. Jones, notes to, 17 Am. St. Rep., 485; Hall v. Barrons, 10 Jur. (N. S.), 55; Burry v. Bedford, 9 Jur. (N. S.), 956; Mattingly v. Stone, 12 Ky. Law Rep., 76.)
5. Transferee can not sell his goods as made by transferrer. (Browne on Trade-marks, 490, 672, note 4; Partridge v. Menck, How. App., 559; Sherwood v. Andrews, 5 Am. Law Reg. (N. S.), 588; Medicine Co. v. Wood, 108 U. S., 218; Compere v. Bajou, Browne on Trade-marks, secs. 209, 210, 211; Symonds v. Jones, 17 Am. St. Rep., 485.)
6. A corporation organized under chapter 56, General Statutes, ceases to exist when the stock is owned by one person. (Gen. Stats., chap. 56, secs. 1, 17, 18; 3 Bland Ch. (Md.), 442.)
7. A corporation may be dissolved *de facto* before its legal right to exist has expired and before it is dissolved *de jure* (4 Am. & Eng. Enc. of Law, note 3, p. 294; 2 Morawetz on Corporations, 2 ed., 962; 66 Am. Dec., 490; 72 Am. Dec., 685.)

WM. LINDSAY ON SAME SIDE.

1. If a trade-mark indicates that the article upon which it is used was manufactured by or under the personal supervision of one whose name appears on such trade-mark, but who has, in fact, parted with his interest in the business and the trade-mark, this misrepresentation must be counteracted by some statement accompanying or made part

Geo. T. Stagg Co., &c., v. E. H. Taylor, Jr., & Sons.

- of the trade-mark, and showing that it is being used by the successor in business of the originator of the trade-mark whose name appears as part thereof. (Browne on Trade-marks, sec. 208; Symonds v. Jones, 82 Me., 302; Manhattan Med. Co. v. Wood, 108 U. S., 218; note to Symonds v. Jones, 17 Am. St. Rep., 496.)
2. All the way down from Taylor to the E. H. Taylor, Jr., Co., the essential feature of the trade-mark was the symbol "O. F. C.," and none of the other words were regarded as parts of that trade-mark. (L. H. Harris Drug Co. v. Stuckey, 46 Fed. Rep., 624.)
 3. The order of reference was merely interlocutory. (Adkisson v. Dent, 88 Ky., 628.)

JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

In January, 1887, the appellees, E. H., J. S. & Kenner Taylor, formed a partnership under the name of E. H. Taylor, Jr., & Sons, and began the manufacture of whisky at what had theretofore been known as the "J. S. Taylor Distillery," in Woodford County, Ky. They at once changed the name of their distillery to the "Old Taylor" distillery, and before the end of the year had discontinued the use of the name, "J. S. Taylor," in connection with the distillery or the whisky manufactured there, branding, advertising and selling their product as "Old Taylor" whisky. They devised a brand which was put on barrels, bottles and other packages and used in their advertisements, circulars, letter-heads, etc., consisting of the words "Old Taylor Hand-made Sour Mash Whisky. E. H. Taylor, Jr., Distiller, Frankfort, Ky," arranged in a circle; and underneath this appeared the inscription, "E. H. Taylor, Jr., & Sons," in *fac simile* of the handwriting of E. H. Taylor, Jr. They branded other of their whiskies, later on, "Old Taylor," and underneath these words placed the inscription, "E. H. Taylor, Jr., & Sons," in the autograph of E. H. Taylor, Jr. They continued without interference to operate the distillery and transact business as whisky merchants, with office

Geo. T. Stagg Co., &c., v. E. H. Taylor, Jr., & Sons.

and headquarters at Frankfort, some seven or eight miles distant from their distillery, until the early part of 1889, when, as we learn from their petition, the appellants began to manufacture whisky at their distilleries, known as the "O. F. C." and "Carlisle" distilleries, near Frankfort, and to imitate the brands of the appellees, use the autograph signature of E. H. Taylor, Jr., and otherwise interrupt and injure their business. On the 16th of October, 1889, they brought this action to prevent the appellants from further using the brands and script in question and for damages.

The appellants asserted the right to use the disputed brands, including Taylor's autograph, and set up by way of counterclaim that the appellees had themselves wrongfully appropriated the brands, trade-marks, labels, etc., of the appellants, for which they asked damages. They based their claims upon a state of case growing out of E. H. Taylor's connection with themselves in operating the "O. F. C." and "Carlisle" distilleries prior to the formation of the partnership of E. H. Taylor, Jr., & Sons in January, 1887.

Upon hearing, after an elaborate preparation of the case, the chancellor determined the issues of fact and of law adversely to the appellants, and enjoined them from using the words "E. H. Taylor, Jr., Distiller," and the autograph signature of E. H. Taylor, Jr., upon any whiskies produced at their "O. F. C." and "Carlisle" distilleries since January 1, 1887; ordered an account taken of profits on the whiskies manufactured by the appellant since January, 1887, on which the script autograph had been used, and dismissed their counterclaim.

The controlling questions are, has E. H. Taylor, Jr., so

complicated himself with the business of the appellants during the years prior to January, 1887, as to deprive himself and his associates of the use of the firm name, E. H. Taylor, Jr., & Sons, and as to confer on the appellants the right to use against his will the autograph signature of E. H. Taylor, Jr. And have the appellants in connection with E. H. Taylor, Jr., or otherwise, so appropriated the name, "Old Taylor," for the whiskies theretofore made at the "O. F. C." and "Carlisle" distilleries as to preclude the appellees, E. H. Taylor, Jr., & Sons, from such use as a trade-mark or brand?

In 1868, or 1869, E. H. Taylor, Jr., became the owner of and began to operate a distillery in Franklin County, near Frankfort, to which he gave the name of "O. F. C." Distillery, and to the product of which he gave the name of "O. F. C. Whisky." He put upon his packages of whisky, and used upon labels and in advertisements, a brand, in circular form, consisting of the words "O. F. C. Hand-made Sour Mash Whisky, E. H. Taylor, Jr., Distiller, Frankfort, Ky."

Taylor continued to operate the distillery in this way until about May, 1877, when he failed, and was forced by his creditors into bankruptcy. In December, 1877, a composition was effected with his creditors at twenty cents on the dollar, and Gregory, Stagg & Co., St. Louis whisky merchants, and large creditors of Taylor, agreed to furnish the funds necessary to effectuate the composition—an arrangement being made alike profitable to both parties. In pursuance of this arrangement, the O. F. C. distillery property was, by order of the United States District Court, reconveyed to Taylor, who, with his wife, conveyed the property to Geo. T. Stagg. Taylor then

Geo. T. Stagg Co., &c., v. E. H. Taylor, Jr., & Sons.

assigned to Stagg the O. F. C. trade-mark, and Stagg, Gregory, Stagg & Co. uniting with him, leased to Taylor the O. F. C. distillery property with the right to use the O. F. C. trade-mark. Taylor continued the business in his own name, the "O. F. C." whisky, in the meantime, attaining a phenomenal reputation, until the fall of 1879, when, for reasons not disclosed in the record, a corporation was organized and created of the style of "The E. H. Taylor, Jr., Company." To that corporation Stagg, in October, 1879, conveyed the distillery property and also assigned the trade-mark. As this trade-mark or brand is, to an important extent, the subject-matter of this litigation, we turn to the registration made of it by Taylor in the patent office in 1872, and to its reregistration in the same office by Geo. T. Stagg as assignee of Taylor, made shortly before its assignment to the E. H. Taylor, Jr., Co. The specification filed by Taylor is as follows: "The whisky made by me is hand-made sour mash whisky, and as such is known in the market. The trade-mark consists of the letters 'O. F. C.' and is used with or without the words 'Hand-made Sour Mash Whisky, E. H. Taylor, Jr., Distiller, Frankfort, Ky.,' or words to like effect. It is branded on the heads of the barrels or packages containing said whisky, and, therefore, mostly used in black color, though it may also, in suitable tint, be printed on labels that apply to bottles, and on show-cards, or notices that advertise the same to the public." Stagg, in 1878, thus described it:

"My trade-mark consists of the letters 'O. F. C.,' the same being an arbitrary symbol. This trade-mark has generally been arranged as shown in the accompanying *fac simile*, to-wit, in connection with the words 'Hand-

Geo. T. Stagg Co., &c., v. E. H. Taylor, Jr., & Sons.

made Sour Mash Whisky, E. H. Taylor, Jr., Distiller, Frankfort, Kentucky;’ but the said words may be transposed, some of them omitted, or other words substituted, as may be found most convenient for the purpose intended, without materially changing the character of my trade-mark, the essential feature of which is the symbol consisting of the letters ‘O. F. C.’” Again, in October, 1881, the E. H. Taylor, Jr., Co. registered this trade-mark in the patent office in substantially the language employed by Stagg some three years before.

At this point in the history of the case we may state our conclusion to be, that the trade-mark thus coming to the ownership of the corporation, E. H. Taylor, Jr., Co., consisted, so far as it was exclusively distinctive in its character, only of the letters “O. F. C.” The other words were appropriately grouped about these letters to indicate the general character of the whisky and that E. H. Taylor, Jr., was the distiller. We do not suppose these words, “hand-made” and “sour mash,” are such as can properly be claimed and used exclusively as a trade-mark, and we suppose the name “E. H. Taylor, Jr.,” was one for which another name was to be “substituted,” as “Distiller,” when occasion demanded it, which would be when Taylor ceased to be the distiller of the “O. F. C.” whisky. But be this at it may, the intention of the parties adopting this trade-mark, as expressed in its repeated registration, is to the effect that the symbolic letters, “O. F. C.,” alone constituted the trade-mark.

Upon the organization of this corporation Stagg became its president and E. H. Taylor, Jr., its vice-president, the stock being owned and controlled by them, with all distilling operations under Taylor’s management. It

Geo. T. Stagg Co., &c., v. E. H. Taylor, Jr., & Sons.

erected at once another distillery adjacent to the "O. F. C.," and to it gave the name of the "Carlisle Distillery," and upon all packages of whisky manufactured at this distillery the company placed a brand consisting of the words, "Carlisle Standard Sour Mash Whisky, E. H. Taylor, Jr., Co., Distiller, Frankfort, Ky." There was no registration of this brand as a trade-mark, but the fair inference is that its "essential feature" was intended by the parties to be the word "Carlisle." The words "Standard Sour Mash Whisky" were not so intended, even if they could have been so used, and for the name of the distiller in the brand there was to be substituted, as we must suppose, the name of the person of whom it could be truthfully said, he was the "distiller."

In the operation of these distilleries—the "O. F. C." and the "Carlisle"—the distiller was E. H. Taylor, Jr. That it was deemed important to indicate to the trade that he was the distiller is shown by the conduct of all the interested parties. He had been engaged in distilling for more than twenty years, and had given the "O. F. C." whisky a reputation equal to any made in Kentucky. Its superior quality was attributed largely to his skill as a distiller, and the intelligent and careful superintendency he gave to the methods of distillation. In one of the E. H. Taylor Co.'s circulars (and we use it as a sample of many others of the same import), it is said: "Mr. Taylor's long experience in distilling and his intelligent acquaintance, theoretically and practically, with the arcana of fermentation and distillation, together with his known pride in excelling in the quality of product, are guaranty of that quality."

In 1880, or 1881, to still further impress on the public

and the trade the personal connection of E. H. Taylor, Jr., with the manufacture of its whiskies, for the somewhat impersonal designation "E. H. Taylor, Jr., Co., Distillers," was substituted the words "E. H. Taylor, Jr., Co., Distillers," in the well-known and striking autograph signature of E. H. Taylor, Jr., with a "caution" to the trade that such script was the test of the genuineness of "O. F. C." and "Carlisle" whiskies in the market. Was this autograph of E. H. Taylor, Jr., whether in the form of the individual name of "E. H. Taylor, Jr., Distiller," or of the corporate name of "E. H. Taylor, Jr., Co." a part of the trade-mark of the "O. F. C." and "Carlisle" whiskies? In this connection it is interesting to notice the origin of the adoption of this script as shown by the testimony. Stagg says that on an occasion when Taylor was in St. Louis, the latter noticed a striking script signature on packages of imported brandy and was impressed with the idea that the signature of the company, as written by him, would be appropriate and look well on a barrel. Taylor suggested it, Stagg agreed with him, and it was done.

It is not pretended that the corporation purchased from Taylor the right thus to appropriate his personal signature, or that he was compensated therefor by any one in any way, or to any extent. Taylor contends that it was a mere fancy with him, and was intended to show his personal identification with the distillery operations of the company.

That such was the intention seems clear enough, and such was doubtless the effect of the use of the script. The combination of Taylor's name and the *fac simile* of his striking signature would easily and necessarily raise

Geo. T. Stagg Co., &c., v. E. H. Taylor, Jr., & Sons.

the inference that he was not only personally connected with the company, but was in fact its "distiller." It seems doubtful that such use could have been made of this autograph after Taylor withdrew from the concern and ceased to be its distiller, even if in express terms he had attempted to sell it to the corporation or to Stagg. As aptly said by counsel, "public policy and common honesty would forbid any such transaction." Be that as it may, there has been no such transfer or attempted sale. The claim of appellants, through the E. H. Taylor, Jr., Co., to the continued use of this autograph is based on an inference merely, arising out of Taylor's consent to its use while he was identified with the business. It was not a part of the original trade-mark, but is claimed as a sort of adjunct thereto. Considering the circumstances of its adoption, that it was inspired by the mere fancy of Taylor, that there was no consideration for its use, that there was no agreement or contract connected with its use, and not overlooking the fact that its use pointed out Taylor as the distiller of the concern for the time being and identified him therewith as much so as his physical features would have done, and that a continuance of this misleading feature would be an imposition on the public, we are convinced that even after the adoption of this script, the trade-marks of the company, and those claiming thereunder, consisted of the symbol "O. F. C" and the name "Carlisle." These were the "essential features," and the fact that the other words might be "omitted" as shown by the specification of the O. F. C. trade-mark in the patent office, shows that these other words were not regarded as a part of the trade-mark. (See similar registration in Harris Drug Co. v. Stucky,

46 Federal Reporter, 624.). In 1882, the E. H. Taylor, Jr., Co. purchased a third distillery, situated about six miles from Frankfort, in Woodford County, which had theretofore been owned and operated by J. S. Taylor. They operated this distillery in the name of J. S. Taylor, using the brand he had theretofore used, viz.: "J. S. Taylor's Hand-made Sour Mash Whisky, Woodford Co., Ky.," and in addition thereto used the name, "J. Swigert Taylor" in *fac simile* of his handwriting.

The company continued to operate these three distilleries, and to do so successfully, until in December, 1886, when, in pursuance of a written contract to that effect, Stagg and the E. H. Taylor, Jr., Co. conveyed to E. H. Taylor, Jr., the J. S. Taylor distillery in Woodford County, in consideration of which Taylor relinquished all interest in and to the effects and business of the company and retired therefrom. Upon obtaining the J. S. Taylor distillery, Taylor at once associated his sons with himself in business as E. H. Taylor, Jr., & Sons, and, as we have seen, began the manufacture of whisky at the J. S. Taylor distillery. The withdrawal of E. H. Taylor, Jr., from the company left Geo. T. Stagg the sole owner of the stock of the company, and the "O. F. C." distillery was run by him in the name of the company until July, 1887. From that date until January, 1889, both the Carlisle and the O. F. C. distilleries remained idle, as the Carlisle distillery had remained from the beginning of the year 1887. The "Geo. T. Stagg Co." was organized in November, 1887, and thereupon the E. H. Taylor, Jr., Co. surrendered its distilleries, warehouses, dwelling-houses, grain elevators, cattle-pens, and other properties and its goodwill, trade-marks, brands, etc., to the Geo. T. Stagg Co.,

Geo. T. Stagg Co., &c., v. E. H. Taylor, Jr., & Sons.

and that company leased these properties to the appellant, Stagg. Upon the organization of the Geo. T. Stagg Co., the purpose of which organization was to operate distilleries, manufacture, purchase and sell whiskies, buy, feed and sell cattle, etc., the trade and public were notified by circulars. The apparently defunct E. H. Taylor, Jr., Co., notifying the "trade" that it had transferred to "the Geo. T. Stagg Company, of Louisville, Ky., the O. F. C. and Carlisle distilleries, situated near Frankfort, together with the brands, trade marks, good-will, etc., of the business," and directing "holders of warehouse receipts for O. F. C. and Carlisle whiskies, stored in bonded or free warehouses," to hand in their receipts to that company when wishing to withdraw their goods.

The Geo. T. Stagg Co., in the same circular, stated to the public, among other things, "that in methods of manufacture and character of materials used," they would omit nothing to sustain the reputation of the products of the celebrated O. F. C. and Carlisle whiskies. The company also placed in large letters on its office doors in Louisville, the words "The Geo. T. Stagg Company, Distillers of O. F. C. and Carlisle Whiskies."

These circumstances, and others we need not stop to discuss, induce us to believe that it was the intention of all the parties, at the time of the withdrawal of Taylor from his business association with Stagg, that the corporation, E. H. Taylor, Jr., Co., was to cease all active business operations. It deliberately advertised itself as going out of business and as having turned over its possessions, good-will, etc., to another. The Geo. T. Stagg Co. stepped into its place, and so notified the public. It may be true that Stagg, who owned all its stock, found it

convenient to retain the name merely for purposes connected with certain governmental regulations. As a matter of law it stood suspended so far as the public was concerned. (Louisville Banking Company v. Eisenman, &c., 94 Ky., 83.) We do not believe, and this is the point in considering the facts just enumerated, that it was incompatible with business integrity on the part of Taylor, or violative of any of the legal rights of Stagg or the Geo. T. Stagg Company, that Taylor should, in connection with his sons, assume the partnership name of E. H. Taylor & Sons, though similar in appearance to the corporate name "E. H. Taylor, Jr., Co." We think rather that it was the expectation of all the parties concerned that the name of E. H. Taylor, Jr., as a part of the corporate name of a defunct corporation should, within a reasonable time, entirely disappear. That it was the ambitious purpose of Geo. T. Stagg to substitute his own name, or that of the corporation bearing his name, as the distiller and proprietor of the famous O. F. C. and Carlisle distilleries and their accompanying brands of whisky, we do not doubt. He made no complaint of the use of that firm name by the Taylors when they assumed it, but, on the contrary, sold them, as such firm, some twenty-odd thousand dollars worth of J. S. Taylor whisky in the spring of 1887.

It follows, from what we have said, that upon their resumption of business in 1889, the Geo. T. Stagg Co. and Stagg could not lawfully use the autograph signature of E. H. Taylor, Jr., as it might appear in the corporate name E. H. Taylor, Jr., Co., or otherwise, or advertise him as the distiller of their O. F. C. or Carlisle whiskies,

Geo. T. Stagg Co., &c., v. E. H. Taylor, Jr., & Sons.

as they claimed they had the right to do, and, in some instances, did.

Nor do we think the appellants can justly complain of the use by the appellees of the trade-mark, "Old Taylor" whisky. While there is abundant proof that the O. F. C. and Carlisle whiskies were frequently called by dealers O. F. C. (Taylor) or Taylor's O. F. C., Taylor Carlisle or Carlisle (Taylor), etc., yet the parties interested and who alone had the right to name their whisky and adopt its trade-mark as a distinguishing feature, did not so call it or brand it "Taylor" or "Old Taylor" whisky, or in anywise associate the name Taylor with it, save in the use of the signatures heretofore discussed; though at the time the suit was instituted the proof conduces to show that the appellants began to apply to the O. F. C. whisky the name of Taylor whisky. We conclude, therefore, that the chancellor properly enjoined the appellants from advertising E. H. Taylor, Jr., as the "Distiller" of their "O. F. C." or "Carlisle" whiskies, save when such statements were in fact true. The words E. H. Taylor, Jr., constituted no part of their trade-mark and their use was an imposition on the public, save when they could be truthfully used. (*Mattingly v. Stone*, 12 Ky. Law Rep., 76; *Browne on Trade-Marks*, secs. 57 and 437.)

That the appellants were also properly enjoined from the use of the *fac simile* of the autograph signature of E. H. Taylor, Jr., save as to goods made before January, 1887; and this is true, whether used with or without the additional word "Company." The effect is the same and was intended to indicate the continued personal connection of Taylor with the O. F. C. and Carlisle whiskies. The autograph can not be used to effectuate such an intention,

and such was the manifest design and would be the necessary result of such use by the appellants. (*Symonds v. Jones*, notes to, 17 Am. St. Rep., 485; *Browne, Trade-Marks*, sec. 208.)

The judgment is also to be approved in denying to the appellant the use of the words "Taylor" or "Old Taylor" as brands for their whiskies, and in confirming such use to the appellees, and in dismissing the counterclaim of the appellants.

But the decree directs an accounting of profits, and that, too, from January 1, 1887, when there was no complaint until in 1889. It can hardly be claimed that this is proper even if damages are recoverable at all in this case. There has been no judgment or final order on this branch of the case, but the order of reference to the master indicates the basis for a further judgment. It does not seem to us that the appellees are entitled to an account of profits. The proof does not show any fraudulent intent on the part of the appellants, or those under whom they claim. It is shown that they used no other brands, labels, advertisements, etc., than they had always used or supposed themselves entitled to use, and this they did under color at least of title and conveyance from Taylor. During the whole of the years 1887 and 1888, for a portion of which time at least the appellants manufactured whisky, there was no complaint. In the conclusions reached we have adopted the theory of the appellees, that the use of the name of E. H. Taylor, Jr., and his autograph by the appellants was in the nature of a license or permit, and we do not see that this has been abused or extended unreasonably. Relief in the way of damages is frequently refused by courts of equity, even when the

Geo. T. Stagg Co., &c., v. R. H. Taylor, Jr., & Sons.

right of the party to an injunction is acknowledged. (McLean v. Fleming, 96 U. S., 245; Cox's Am. Trade-mark Cases, 675-717.) This order of reference, however, is merely interlocutory, and the future conduct of the case in this behalf will, doubtless, be based on correct legal principles.

Perceiving no error in the judgment, it is *affirmed*.

INDEX.

ABEYANCE—

As to title in abeyance—See REMAINDERS, 1.

ACCIDENT INSURANCE—

1. When in an action upon an accident insurance policy it is shown that the insured was found dead in the water, the jury have the right to presume that he came to his death by accidental drowning, and plaintiff is entitled to have the question submitted to them. *Couadeau v. American Accident Co.* 280
2. Where the plaintiff has first made out his case it is not within the province of the court to take its consideration from the jury on the proof of the defendant, unless such proof is in the nature of an absolute bar to the recovery. Therefore, in an action upon an accident insurance policy in which one of the defenses was that the insured came to his death while under the influence of intoxicating drinks, which, if true, was by the terms of the policy a bar to a recovery, the fact that the uncontradicted testimony for defendant showed that the insured was drunk when last seen alive, under circumstances which created a strong probability that in a short time thereafter and while in the same condition he accidentally fell into the river in which his dead body was afterward found, did not authorize the court to give a peremptory instruction to find for defendant, as the testimony showed only a probability, though a strong one, that the insured was drunk at the time of his death. *Idem* . 280

ACCOMPLICE—

Under an indictment for incest alleged to have been committed by defendant with his daughter, the jury were authorized to convict upon the testimony of the daughter alone, as she can not be regarded as an accomplice. *Whittaker v. Commonwealth* 682

ACKNOWLEDGMENT—

As to failure to examine wife separately and apart from her husband—See MORTGAGES, 8.

ACTIONS—

As to right of plaintiff to dismiss—See DISMISSAL OF ACTIONS.

As to right of action against institutions maintained by State aid—See CHARITABLE INSTITUTIONS.

ACTIONS TO QUIET TITLE—

It seems to the court that the allegations of the petition in this case, if sustained by proof, are sufficient to enable plaintiffs to maintain

 Actions to Quiet Title. Appeals.

ACTIONS TO QUIET TITLE—Continued.

their action so far as it is in the nature of a bill of peace. But even if not, as defendants in their answer and counter-claim prayed for their title to be quieted, adverse to plaintiff, and tendered an issue involving question of superior title, it was competent for the lower court to try and determine it. *Magowan v. Branham, &c.* . . . 581

ADMINISTRATORS—See **EXECUTORS AND ADMINISTRATORS.**

ADVERSE POSSESSION—

As to right to use of passway by prescription—See **PASSWAYS.**
 In this action to quiet title it is immaterial whether the deed under which plaintiff claims was effectual to pass a good title, as the grantee, from the date of it, took possession of the land by tenants and held and claimed it adversely to extent of his boundary for a period long enough to give him a possessory title. And the deed is, therefore, now to be considered with reference simply to the extent of such boundary described and claimed by him. *Magowan v. Branham, &c.* . . . 581

AFFIDAVIT—

As to failure of officer to sign jurat— See **WARNING ORDER, 3.**

AGENCY—

1. An agent can not escape liability for his negligence upon the ground he was acting for another. *Martin's adm'r v. L. & N. R. Co.*, 612
2. Notice to agent of mortgagee of falsity of clerk's certificate of acknowledgment and of fraud in procurement of mortgage was notice to principal. *Aultman-Taylor Co. v. Frasure, &c.* . . . 429

AIDERS AND ABETTORS—See **HOMICIDE, 1.**

ALIENATION—

Prohibition against void—See **DEVISE, 17.**

ALIMONY—See **DIVORCE AND ALIMONY.**

ANTE-NUPTIAL CONTRACTS— See **HUSBAND AND WIFE, 1.**

APPEALS—

As to proper mandate where lower court has erred in granting new trial—See **NEW TRIAL.**

As to power of lower court over case pending appeal—See **PRACTICE IN CIVIL CASES, 8.**

1. In consolidated actions by the Commonwealth to recover taxes, the court having overruled a demurrer to the plea of exemption interposed by the defendant, a dismissal of the petition was bound to follow; and, although the State afterward introduced testimony to sustain the allegations of its petitions, and the petitions were dis-

Appeals.

APPEALS—Continued.

- missed on final hearing, neither a motion for a new trial nor a separation of the conclusions of law and fact was necessary to enable this court to review the questions of law, which were the only questions before the court, there being no contrariety of testimony. *Commonwealth v. Railroad Companies* 60
2. Although an amended petition was tendered and an order made permitting it to be filed, yet as it is not in fact in the record, which is certified to be a complete transcript, the presumption must be that although the plaintiff had permission to file it, it was not in fact filed. *Lacey v. Lacey* 110
3. Where the wife, by reason of an ante-nuptial contract, had no interest in the husband's estate upon his death, neither she, nor her administrator after her death, had any right to appeal from an order of the county court, admitting his will to probate. *Biggerstaff's Ex'ors v. Biggerstaff's Adm'r* 154
4. No separation by the court of its conclusions of law and fact is necessary to the prosecution of an appeal where a case is tried upon an agreed state of facts. *City of Owensboro v. Weir, Weir & Walker* 158
5. Where the county court made an order noting the acceptance of a county levy bond executed at a former term, an action having been brought on the bond, the sureties had such an interest as gave them the right to except to the making of the order and to appeal therefrom to the circuit court. *Boyd County, &c., v. Ross* . . 167
6. Judgment of circuit court directing county court to probate a will reversed because the verdict of the jury "for the will" was not supported by the evidence; and the reversal is with direction to the county court to reject the will. *Mendenhall, &c., v. Tungate, &c.* 208
7. A motion in this court for a mandamus is the proper remedy to compel the lower court to grant an appeal in cases where the party complaining is entitled to an appeal. *Kelly v. Toney, Judge* . . . 338
8. A judgment restraining a party from prosecuting any proceeding in another State to obtain possession of certain property and requiring him to dismiss an action then being prosecuted by him for such possession, and to send a telegram to his attorneys to that effect, appears upon its face to be a final order, from which an appeal lies, and the judge of the lower court having refused to grant an appeal, a motion in this court for a mandamus to compel him to do so is sustained, as the term of the lower court at which the judgment was rendered has not yet expired. The mere fact that the judgment is made operative only "until the further order" of the court does not make it merely an interlocutory order. *Idem* 338
9. The clerk of the Court of Appeals has no power to grant an appeal from a judgment until after the expiration of the term of the lower
Vol. 95--43.

Appeals. Assignments by Operation of Law.

APPEALS—Continued.

- court at which judgment was rendered. Therefore an appeal granted by him during the term is absolutely void, and a supersedeas issued by him upon such an appeal being also void may be disregarded. *Schmidt v. Mitchell* 342
10. For a mere irregularity in the granting of an appeal or the issual of a supersedeas, the proper remedy is by a motion to dismiss the appeal or discharge the supersedeas. It is only where the appeal and supersedeas are void that they may be disregarded. *Idem* . . . 342
11. Application for writ of prohibition denied by Court of Appeals upon the ground the court sought to be restrained has jurisdiction. *Goldsmith v. Owen, Judge* 420

APPEARANCE—

- The defendant by filing a general demurrer to the petition entered his appearance. *Chaffin v. Fulkerson* 277

APPOINTMENT—

As to power of—See DEVISE, 1.

ARREST—

- As to right of officer to shoot offender resisting arrest—See SELF-DEFENSE, 6.
- As to right of one summoned to aid officer in making arrest to defend himself—See SELF-DEFENSE, 2.

ASSAULT—

- An action does not lie against the Louisville Industrial School of Reform for an assault upon an inmate by an officer or employe thereof, the institution being a charity maintained by taxation and State aid. Damages are to be paid out of the pocket of the wrong-doer and not from the trust fund. *Williamson by, &c., v. Louisville Industrial School of Reform* 251

ASSIGNMENTS BY OPERATION OF LAW—

1. Where a mortgagee releases his mortgage and accepts from the debtor, who is insolvent, a mortgage upon other property to secure not only the debt secured by the released mortgage, but also an additional amount advanced to the debtor simultaneously with the execution of the new mortgage, the latter mortgage does not operate as an assignment under the statute forbidding preferences by insolvent debtors, although it was executed in part to secure a pre-existing debt, there being no intention to prefer, and in fact no preference, the creditor getting no greater security than he had before. *Meier v. Flinsbach, &c.* 189
2. The mere fact that a mortgage executed by an insolvent debtor to secure a debt created simultaneously with its execution is not lodged for

 Assignments by Operation of Law. Assignments for Creditors.

ASSIGNMENTS BY OPERATION OF LAW—Continued.

record within thirty days after its execution does not cause the mortgage to operate as an assignment under the statute, as the statute can not apply to any case unless there was a pre-existing debt. The proviso of the statute that nothing therein "shall vitiate or affect any mortgage made in good faith to secure any debt or liability created simultaneously with such mortgage, if the same be lodged for record within thirty days after its execution," applies only where such a mortgage is executed after the debtor has committed some act to which the body of the statute applies, and in such a case the mortgage is valid, notwithstanding the prior involuntary assignment, provided it is lodged for record within thirty days after its execution; but otherwise it is not valid as against the assignment, and in an action to have the prior act of preference declared to operate as an assignment the proceeds of the mortgaged property must be distributed among all the creditors. *Idem* 139

ASSIGNMENTS FOR CREDITORS—

As to right of assignee to exercise power of revocation reserved by assignor in a deed—See **DREDS**, 2.

1. A deed of assignment for the benefit of creditors passes to the assignee the title to the real estate conveyed, although by virtue of statute (Gen. Stats., chap. 63, art. 1, sec. 22) the assignee can not pass the title to another unless the sale shall be in pursuance of a judgment of court, or the maker of the deed of trust shall join in the writing evidencing the sale. Therefore the wife of the assignor may, by a deed subsequently executed by her alone, pass her potential right of dower. *Shinkle's ass'ee v. Bristow* 84
2. Where a debtor who made an assignment for the benefit of his creditors was, by an agreement with the assignee, allowed to reserve his family residence in consideration of his removing a lien upon other property and of his wife relinquishing her dower, the lien having, with the knowledge and consent of the assignee, been removed by the use of a fund held by the debtor in trust for others, the beneficiaries of the trust fund are entitled to be reimbursed out of the proceeds of the assigned estate, their money having been applied to the payment of the debts of the assignor with the knowledge and consent of the assignee. *Idem* 84
3. As an assignee for the benefit of creditors acquires an equitable title by the delivery to him of the deed of assignment duly executed and acknowledged, although not lodged for record, his equity is superior to that created by the subsequent levy of an attachment upon the property assigned. *First Nat'l Bank of Covington v. The D. Kiefer Milling Co.* 97
4. Although property in which an interest was conveyed by a father to his daughter was used by the father and his sons in their partnership

Assignments for Creditors. Attachment.

ASSIGNMENT FOR CREDITORS—Continued.

- business, the daughter, having failed for several years to assert any claim for rent, ought not, after the firm has made an assignment for the benefit of creditors, be heard to assert such a claim, it being manifest from the payments made by the father for both the daughter and her husband that no claim for rent was intended to be asserted. *Hill, &c., v. Cornwall & Bro.'s ass'ee* 512
5. Where there is an assignment of partnership property for the benefit of creditors, and a separate assignment by each partner of his individual property, the rule of distribution as between partnership creditors and individual creditors is the same that it is where there is a joint assignment of partnership assets and individual assets, and if the partnership creditors elect to avail themselves of the equitable rule which gives them priority over the individual creditors as to firm assets, they can not share in the individual assets until the individual creditors have been made equal with them. *Idem* 512
6. An assignee, acting upon his own judgment and also upon the advice of a large number of creditors, having continued the operation of an assigned factory in order to work up the material on hand, and also to preserve the business, can not be held liable for any loss sustained, all parties having acted in the best of faith and with a view to advance the interest of creditors. *Idem* 512
7. Where there is an assignment for the benefit of creditors the chancellor has no power, at the instance of a creditor, to decree the sale of property owned jointly by the debtor with another as provided by section 490 of the Civil Code. The legal title being in the assignee, he alone can sue. *Idem* 512
8. As there was a continuous service by counsel for two years, with questions arising of the greatest importance to the assignee and the creditors, and the assets were of the value of \$200,000, the fee of \$8,000 allowed to counsel was not unreasonable and is fully sustained by the testimony. *Idem* 512

ATTACHMENT—

1. The single fact a defendant has no property in this State subject to execution, or not enough thereof to satisfy the plaintiff's demand, is not sufficient to authorize an attachment, but the additional and independent fact that the collection of the demand will be endangered by delay in obtaining judgment or a return of no property found must also be alleged and shown. *First Natl. Bank of Covington v. The D. Kiefer Milling Co.* 97
2. In a contest between equities that which is prior in time must prevail. Therefore, as an assignee for the benefit of creditors acquires an equitable title by the delivery to him of the deed of assignment

Attachment. Bills of Exceptions.

ATTACHMENT—Continued.

duly executed and acknowledged, although not lodged for record, his equity is superior to that created by the subsequent levy of an attachment upon the property assigned. *Idem* 97

ATTORNEYS—

As to reasonable fee—See **ASSIGNMENTS FOR CREDITORS**, 8.

As to power of mayor of city to employ—See **TOWNS AND CITIES**, 1.

BANK STOCK—

As to separate estate of married woman in bank stock—See **HUSBAND AND WIFE**, 5.

BASTARDS—

A **bastard** is not capable of inheriting from or transmitting an inheritance to a legitimate child of his reputed father. Therefore, upon the death without issue of one of two bastard brothers born of the same mother, his real estate passed by inheritance to his mother and bastard brother to the exclusion of a legitimate son of his reputed father. And the fact that his estate came to him by devise from his reputed father, and that he was an infant at the time of his death, can make no difference, as section 9 of chapter 31 of the General Statutes, which provides that upon the death of an infant without issue, his real estate derived by gift, devise or descent from one of his parents "shall descend to that parent and his or her kindred," applies alone to infants born in lawful wedlock. *Blankenship, &c., v. Ross* . 306

BILLS AND NOTES—

1. Where the names of two of three partners were by the request of the third partner signed to a note for money borrowed to be used, and which was used, for partnership purposes, the names signed must be regarded as the firm name for that particular transaction. *National Exchange Bank of Lexington v. Wilgus' ex'ors* 309
2. While a renewal of such a note after the death of the third partner did not bind him, yet as there was no intention to release him from the payment of the original note, and it was canceled through inadvertence, he remained bound thereon. *Idem* 309

BILLS OF EXCEPTIONS—

1. Time for filing a bill of exceptions can not be extended beyond the term succeeding that at which the motion for a new trial is overruled. *Johnson, &c., v. Stivers, &c.* 128
2. The time for filing a bill of exceptions in the Jefferson Court of Common Pleas can not be extended beyond one hundred and twenty days from the entry of the order overruling motion for new trial. *Idem* 128

 Bonds. Burden of Proof.

BONDS—

1. It is essential to the validity of a county levy bond executed by a sheriff that there should be an order of the county court approving and accepting the bond, and where the court fails to enter such an order during the term at which the bond is accepted, it has no power, at a subsequent term, to enter the order *nunc pro tunc*. Boyd county, &c., v. Ross 167
2. Although the court had no power pending an appeal to rent out land, yet as the plaintiff who was finally adjudged to be entitled to the land has ratified the action of the court, he is entitled to recover on the bonds voluntarily executed by defendants for the rent of land which did not belong to them, but to plaintiff. Parrish, &c., v. Ross 318
3. Where a sheriff, upon motion of two of several sureties in his revenue bond, was required to execute an additional bond, the surety in the new bond had the right to suppose that the sureties in the original bond, other than those who had made the motion to be released, would be bound with him, there being nothing either on the face of the bond or in the records of the county court to vitiate the bond; and it turning out that those sureties were not bound because of the violation of an agreement made in open court that the bond was not to be finally approved until certain other persons had signed as sureties, the surety in the new bond is also not bound, the facts which operated to release the other sureties not being disclosed by the officer taking the bond. Commonwealth v. Berry 443

BOUNDARY—See DEEDS, 4, 5.

It is competent to prove the statements of dead persons as to where corner and line trees which are gone originally stood, and also to show the relative location and calls of adjoining surveys patented subsequent to the date of the patent in question. Whalen v. Nisbet, &c., . 464

BRIDGE—

As to right of city to compel railroad company to restore footway on bridge—See RAILROADS, 22.

As to right of parties under contract for building of piers, etc., of bridge—See CONTRACTS, 2, 3, 4.

BUILDING CONTRACTS—See CONTRACTS, 2, 3, 4.**BUILDINGS—**

Part of realty—See LANDLORD AND TENANT, 7.

BURDEN OF PROOF—

As to burden of showing defects in tax bill—See TAXATION, 4.

Diverse rulings as to burden of proof authorized new trial—See NEW TRIAL, 5.

 Burden of Proof. Charitable Institutions.

BURDEN OF PROOF—Continued.

In the contest of a will the burden was on the propounders of the will to show by a preponderance of the evidence that the testatrix was of testamentary capacity, and on the contestants to show by a preponderance of testimony that she was unduly influenced or coerced. *Johnson, &c., v. Stivers, &c.* 128

CARRIERS—

1. In an action against a common carrier to recover damages for injury to live stock while being transported by it, a denial by defendant of knowledge or information sufficient to form a belief as to whether it injured the stock is not good. *Nashville, &c., R. Co. v. Carrico* . 489
2. Where a contract made with a railroad company for the shipment of live stock provided for the transportation of the stock over the line of another company, which was to receive its proportion of the price of transportation, the former company must be regarded as having made the contract as the latter's agent, and an action against the latter company to recover damages for injury to the stock while being transported over its road may be brought in the county in which the contract was made by the former company. *Idem* . 489
3. Service of process in such an action was properly had upon the defendants' agent nearest the county seat of the county in which suit was brought, although in another county. *Idem* 489

CERTIFICATE—

As to mistake in—See **MORTGAGES**, 3.

CHANGE OF VENUE—

Where an indictment found in the Perry Circuit Court was, upon motion by the Commonwealth for a change of venue, transferred from that court to the Clark Circuit Court, the jurisdiction of the Perry Circuit Court over the subject matter was thereby divested, and a subsequent indictment found in that court against defendant for the same offense and all proceedings under it were void, the case never having been remanded from the Clark Circuit Court; and this is true, although at the time of the trial under the second indictment, the indictment in the Clark Circuit Court had been filed away with leave to redocket, as that court may yet redocket the case and proceed to try the defendant. *Smith v. Commonwealth* 322

CHARITABLE INSTITUTIONS—

An action does not lie against the Louisville Industrial School of Reform for an assault upon an inmate by an officer or employe thereof, the institution being a charity maintained by taxation and State aid. Damages are to be paid out of the pocket of the wrong-doer, and not from the trust fund. *Williamson, by, &c., v. Louisville Industrial School of Reform* 251

 Claims against State. Codes of Practice.

CLAIMS AGAINST STATE—

A claim against the State for work done in copying and engrossing bills under employment of the clerk of the House of Representatives, by direction of the House, is a "contingent expense" of the House, and payable out of the State Treasury upon a voucher, countersigned by the clerk, as provided by section 3 of article 1, chapter 15, General Statutes, now section 342 of the Kentucky Statutes. And as the payment of such "contingent expenses" is expressly provided for by a statute duly passed, the payment does not violate section 230 of the Constitution, which provides that "no money shall be drawn from the State Treasury except in pursuance of appropriations made by law." *McDonald v. Norman, Auditor* 593

CODES OF PRACTICE—

Provisions cited, construed, &c. :

CIVIL CODE—

Section 10 (as amended)	641
Section 12	187
Section 13, subsec. 7	490
Section 51, subsec. 4	491
Section 78	491
Section 117	565
Section 194	101, 102
Section 311	317
Section 317, subsec. 3	640
Section 332	166
Section 334	182
Section 340	640
Section 371	9, 317
Section 372	9
Section 380	645
Section 425	547
Section 474	472
Section 475	474
Section 490	95, 538, 568
Section 491	95
Section 606, subsec. 2	467
Section 625	425
Section 734	344
Section 750	344
Section 757	344, 650
Section 764	651
Section 772	132
Section 838	118

CRIMINAL CODE—

Section 119	372
Section 121	621
Section 124	622

Common Carriers. Constitutional Law.

COMMON CARRIERS—See CARRIERS.

COMMON SCHOOLS—See SCHOOLS.

CONFLICT OF LAWS—

As to probate of foreign wills—See WILLS, 8, 9.

CONSENT—

As to "written consent" to sale by trustee—See TRUSTS, 3.

CONSIDERATION—

As to consideration for option to purchase land—See OPTIONS.

CONSTITUTIONAL LAW—

As to classification of cities—See TOWNS AND CITIES, 3.

As to right to trial by jury—See TRANSFER OF SUITS, 2.

As to time of expiration of terms of city officers elected under the old Constitution—See ELECTIONS, 2.

As to power of Legislature to take property donated to counties for seminaries of learning and vest it in common school trustees—See SCHOOLS, 1.

As to particular provisions of Kentucky Constitution cited, construed, &c.—See CONSTITUTION OF KENTUCKY.

1. Where the construction of railroads had been begun upon the faith of a statute exempting from taxation for a period of five years all railroads thereafter built in this State, the Legislature had no power to repeal the exemption as to such roads, and, as to them, a repealing statute is inoperative. *Commonwealth v. Railroad Companies* 60
2. Special acts of the Legislature regulating the practice in the particular circuit courts under the old Constitution, except such courts as are in continuous session, stand unrepealed by the new Constitution until the Legislature shall pass a general law regulating the practice in circuit courts, no such law having yet been passed, except as to courts in continuous session. Therefore, an act of the Legislature regulating the practice in the Daveiss Circuit Court, and fixing the time at which cases shall stand for trial, is still in force. *Piper v. Gunther & Sons* 115
3. Although section 213 of the Constitution requires railroad companies to receive for transportation cars belonging to other companies, still if such cars are so constructed as to render it unsafe to handle them in the ordinary mode, it is the duty of the company to refuse to receive them. *Lou. & Nash. R. Co. v. Williams* 199
4. Section 158 of the new Constitution limiting the indebtedness of towns and cities, became operative immediately upon the adoption of the Constitution, the maximum limit of the indebtedness of a particular

 Constitutional Law. Constitution of Kentucky.

CONSTITUTIONAL LAW—Continued.

- town or city being determined by the class to which cities of its population were required by the Constitution to be assigned, although the classification had not then been made by the General Assembly. *Beard, &c., v. City of Hopkinsville, &c.* 239
5. The prohibition of that section is against incurring a legal liability to pay in any manner or for any purpose, when a given amount of indebtedness has previously been incurred, and therefore a debt payable upon the happening of some event, such as the rendering of service or the delivery of property, is within the prohibition. And it can make no difference whether the debt be for necessary current expenses or for something else. Nor does the fact that the liability is within the limits of the revenue accruing to meet it prevent the prohibition from applying. *Idem* 239
6. Under the present Constitution of this State the Legislature has no power to change the compensation of an officer during his term of office, whether he be a salaried officer or paid by fees. Therefore the act of June, 1898, requiring the clerk of the Court of Appeals to pay into the State Treasury all fees received by him after retaining, as a salary for himself, four thousand dollars, and after paying his assistants or deputies, can not, even if otherwise constitutional, apply to the present clerk, who was in office at the time of the passage of the act, and even prior to the adoption of the present Constitution, which continued him in office during the term for which he was elected, which has not yet expired. *Commonwealth, by, &c., v. Addams, Clerk* 588
7. The Legislature can not delegate to another department of the Government its power to make laws, and therefore the act in question here is unconstitutional in that it attempts to delegate to this court the power to fix the salaries of the deputies of the clerk of this court, which section 246 of the Constitution provides shall be fixed "by law." *Idem* 588
8. The right of trial by jury can not be impaired or modified by legislative enactment. *O'Connor & McCulloch v. Henderson Bridge Co.* . 633

CONSTITUTION OF KENTUCKY—

Provisions cited, construed, etc.

Section 7	188, 641
Section 120	590
Section 125	116
Section 148	40
Section 154	40
Section 156	234
Section 158	242
Section 160	417
Section 161	590

 Constitution of Kentucky. Contracts.

CONSTITUTION OF KENTUCKY—Continued.

Section 166	243, 418
Section 167	416
Section 218	201
Section 230	595
Section 246	591

CONTESTED ELECTION—

As to notice of contest—See ELECTIONS, 3.

As to powers of contesting and canvassing boards—See ELECTIONS, 4, 5.

CONTRACTS—

Construction of contract between railroad companies as to connection of tracks—See RAILROADS, 16, 17.

Ante-nuptial contract construed—See HUSBAND AND WIFE, 1.

As to consideration for option to purchase land—See OPTIONS.

As to right of contractor to subject rents of ward's lands to pay for improvements made under contract with guardian—See GUARDIAN AND WARD.

1. Where an employe by his dishonest practices compels his employer to discharge him, he is to be treated as having voluntarily refused to comply with his contract, and is liable in damages to his employer for the breach of contract. *Fuqua & Smith v. Massie & Sons* . 387
2. The defendant bridge company was not entitled to annul the contract for the building of the foundations and piers of its bridge under a clause which gave it the right to annul without notice in case the contractors did not well and truly, from time to time, comply with and perform all the terms stipulated, the defendant itself being in default by reason of failure to estimate and pay for work done and materials delivered, without which the contractors could not further comply with and perform all the terms of the contract. And, certainly, a chancellor would, under the circumstances, hold it liable for value of work done and materials and working plant. *O'Connor & McCulloch v. Henderson Bridge Co* 633
3. Although the defendant improperly attempted to annul the contract the plaintiffs were not entitled to anything on account of prospective profits, as it is manifest, in view of the ascertained cost to the company of completing the work, that the contractors would not have made any profit. *Idem* 633
4. The defendant has no cause of action against plaintiffs on account of their alleged failure to progress with the work according to an agreed programme, or failure to comply with the contract in any respect, as the remedy provided for the company, in case of non-

Contracts. Corporations.

CONTRACTS—Continued.

compliance with the contract by the contractors, was the right to annul the contract in either one of the three conditions stated therein and in one of them to have unpaid part of the work done forfeited.
Idem 633

CONTRIBUTION—

1. Where one of several joint devisees loses by paramount title a part of the estate devised, he is entitled to contribution from the other devisees, and this implied warranty of title passes to his heir, but it does not pass to one to whom he sells the devised land, and therefore where such a purchaser loses the land by paramount title, he can not look to his vendor's co-devisees for contribution. *Jones, &c., v. Bigstaff, &c.* 395
2. Where the right to contribution exists it includes not only the value of the land recovered but the expenses of the litigation. *Idem.* . 395
3. The right to contribution does not exist until there is an eviction, and limitation does not begin to run until then. *Idem* 395
4. In this action for contribution, all the devisees not being parties to the action, each defendant is liable only for his part upon the basis that all are solvent and able to contribute. *Idem* 395

CONTRIBUTORY NEGLIGENCE—See NEGLIGENCE, 4, 5.

CORPORATIONS—

1. A person dealing with a corporation must, at his peril, take notice of its charter or articles of incorporation. Therefore, where the articles of incorporation provide that the company shall not incur any liability in excess of a certain amount, one who makes a loan to the corporation in excess of that amount is not entitled, in the event of an assignment by the corporation for the benefit of creditors, to a *pro rata* upon that part of his debt in excess of the amount the corporation was allowed by its articles to incur. *First National Bank of Covington v. The D. Kiefer Milling Co.* . . . 97
2. The stockholders of a corporation organized under chapter 56 of the General Statutes are personally liable for the debts of the corporation to the amount of the unpaid installments on the stock subscribed by them; but a creditor of the corporation may, by special contract, waive his right to look to the individual stockholders, and oral testimony is competent to show such a contract. *Bush, &c., v. Robinson* 492
3. Where the capital stock of a corporation was to be represented by land to be conveyed to the corporation, and it was provided in the articles of incorporation that upon the land being conveyed to the corporation the stockholders should be entitled to have issued to them

Corporations. Courts.

CORPORATIONS—Continued.

- as paid up the full amount of stock subscribed, this provision might as between the stockholders and the corporation, be valid, but it is not so as to creditors, and but for a special contract with the vendor of the land exempting the stockholders from personal liability they would, to the extent of the unpaid installments due upon their subscriptions, be liable to the vendor for the unpaid purchase price of the land. *Idem* 492
4. The purchase of all the stock of a corporation by a single stockholder suspends the existence of the corporation so far as the public is concerned. *Geo. T. Staggs Co. v. E. H. Taylor, Jr., & Sons* . . . 651

COUNTER-CLAIM—

- In an action by the husband for divorce the objection that the wife's answer seeking alimony was not styled a "counter-claim" was waived by plaintiff by replying and joining issue on the matter set up in the alleged counter-claim. *Lacey v. Lacey* 110

COUNTIES—

- A county may maintain an action for injury to its public roads. *Lou. & Nash. R. Co. v. Whitley County Court* 215

COUNTY LEVY—

- It is essential to the validity of a county levy bond executed by a sheriff that there should be an order of the county court approving and accepting the bond. And where the court fails to enter such an order during the term at which the bond is accepted, it has no power, at a subsequent term, to enter the order *nunc pro tunc*. *Boyd County, &c., v. Ross* 167

COURTS—

- As to power of lower court over case pending appeal—See *PRACTICE IN CIVIL CASES*.
- As to power to amend or correct judgments—See *NUNC PRO TUNC ORDERS*.
1. As the Jefferson Court of Common Pleas and Louisville Chancery Court have such control over their judgments for sixty days as circuit courts have over their judgments during the term in which they are rendered, the period of sixty days from the entry or rendition of any order or judgment in these courts is to be regarded as a "term" as to that particular order or judgment. *Johnson, &c., v. Stivers, &c.* 128
2. Where salaries are required by the Constitution to be fixed "by law" the Legislature can not delegate that power to the courts. *Commonwealth, by, &c., v. Addams, Clerk* 589

Criminal Law. Debtor and Creditor.

CRIMINAL LAW—See **KUKLUX LAW**; **OBTAINING MONEY BY FALSE PRETENSES**.As to right of self-defense—See **SELF-DEFENSE**.As to sufficiency and validity of indictment—See **INDICTMENT**.As to competency of testimony—See **EVIDENCE**, 4, 7, 11.

Under an indictment for incest alleged to have been committed by defendant with his daughter the jury were authorized to convict upon the testimony of the daughter alone, as she can not be regarded as an accomplice. *Whittaker v. Commonwealth* 632

CURTESY—

While dower is not an estate until assigned, an estate by the curtesy takes effect as a freehold estate immediately on the death of the wife. *Malone v. Conn, &c.* 93

DAMAGES—

As to measure of damages for injury to abutting property from construction of railroad—See **RAILROADS**, 9.

As to excessive verdict—See **VERDICTS**, 1.

As to measure of damages for wrongful discharge of servant—See **MASTER AND SERVANT**, 3.

1. Where an employe by his dishonest practices compels his employer to discharge him, he is to be treated as having voluntarily refused to comply with his contract, and is liable in damages to his employer for the breach of contract. *Fuqua & Smith v. Massie & Sons* . 387
2. Transfer to equity of an action for damages was not improper where the criterion of recovery required the consideration of various items of account. *O'Connor & McCulloch v. Henderson Bridge Co.* . 633
3. Where building contract gave right to annul for failure to comply with contract damages can not be recovered for their failure to comply. *Idem* 633
4. Contractors not entitled to anything on account of prospective profits in action for breach of contract, it being manifest no profit would have been made. *Idem* 633

DAYS—

As the fraction of a day is not regarded in law the sale or gift of liquor at any time during the twenty-four hours of an election day is a violation of the statute prohibiting the sale or gift of liquor "upon the day" of any general or primary election. *Commonwealth v. Murphy* 38

DEBTOR AND CREDITOR—

As to preference of creditors—See **ASSIGNMENTS BY OPERATION OF LAW**.

 Debtor and Creditor—Deeds.

DEBTOR AND CREDITOR—Continued.

Property given by a debtor to his children when he was in a prosperous pecuniary condition can not be subjected by his creditors. *Shinkle's assignee v. Bristow*. 84

DECEASED PERSONS—

As to parties to actions for settlement of estates of—See **PARTIES TO ACTIONS**, 1.

As to proof of declarations of—See **EVIDENCE**, 9, 10.

DECEDENTS' ESTATES—

As to parties to action for settlement of—See **PARTIES TO ACTIONS**, 1.

DECLARATIONS—

As to proof of declarations of deceased persons—See **EVIDENCE**, 9, 10.

DEDICATION—

As to dedication of street—See **STREETS**, 2.

Where a railroad company constructed for its own use a bridge across a stream by which a town was divided, building under and attached to the main structure a footway for the public use, the company itself having no use for such a passway, there was a dedication of the footway by the railroad company to the public use; and the city having lighted up the way with gas, and by its officers caused the railroad company to make repairs, and aided in constructing the approaches, there was as complete an acceptance by the city of the dedication as was compatible with the right of the owners. *Ky. Cent. R. Co. v. City of Paris*. 627

DEEDS—

As to construction of—See **REMAINDERS**, 1, 2.

Deed absolute in form treated as mortgage—See **MORTGAGES**, 1.

Execution of power of appointment by deed—See **POWERS**, 1.

As to validity of grants from Commonwealth—See **PATENTS**.

As to effect of failure to execute deeds of partition—See **PARTITION**.

As to necessary parties to deed—See **DEVISE**, 8.

As to effect of husband's deed to wife's land in which wife's name appeared only in attesting clause—See **LIMITATION**, 2, 4.

1. The fact that a writing is in the form of a deed is persuasive that a deed and not a will was intended, but it is not conclusive, and if it appears that no interest was intended to vest until after the death of the person named as grantor the writing will, notwithstanding its form, be held to be a will. *Rawlings, &c., v. McRoberts, &c.*. . . 346
2. Where a father conveyed real estate to another in trust for his daughter, reserving "full power to revoke each or any or some or all of

Deeds. Definitions.

DEEDS—Continued.

- the uses hereby created and to cause them to shift to other person or persons, including himself," the title passed to the grantee, subject to the power reserved by the grantor to change the use; and the grantor having made a general assignment for the benefit of his creditors without revoking the grant or changing the use, the right to do so did not pass to the assignee. Such a power of revocation is not an interest in the property that can be subjected by the grantor's creditors. *Hill, &c., v. Cornwall & Bro.'s assignee* . . . 512
3. A deed, although passing no title, may be considered as evidence of boundary claimed. *Magowan v. Branham, &c.* . . . 581
4. The recital in a deed that the land conveyed is a part of a certain survey must yield to calls about the correctness of which there can be no question, and the deed will be held to embrace land included within such calls although outside the survey referred to. *Idem.* . 581
5. By "the upper cliffs on each side Glady Creek," to which the land conveyed was stipulated to run, was manifestly meant cliffs of the tributary branches as well as those of the main creek, because the cliffs by reason of the peculiar formation of that particular region, constituted plain and in fact only practicable landmarks. *Idem.* . 581

DEFEASIBLE FEE—

Created by devise—See DEVISE, 7, 8.

DEFINITIONS—

1. An election *day* defined as embracing the twenty-four hours of the day on which an election is held. *Commonwealth v. Murphy* . . . 38
2. Word *depth* substituted for word *width* in interpreting statute. *Bird, &c., v. Board of Commissioners of Kenton county* . . . 195
3. Construction of lease of railroad with pledge of *net earnings* accruing to lessee on account of business coming *from or over* leased road. *Schmidt, Trustee, v. Lou. & Nash, R. Co.* . . . 289
4. Word *infants* used in statute of descents applied alone to infants born in lawful wedlock. *Blankenship, &c., v. Ross* . . . 806
5. What is *final submission* of case determined. *Vertrees' adm'r v. Newport News, &c., Co.* . . . 314
6. Deed to one for life, remainder to *children, heirs and legal representatives* of life tenant construed. *Coots v. Yewell, &c.* . . . 867
7. Word *survivor* in will construed. *The Coleman-Bush Investment Co. v. Figg, Trustee* . . . 404
8. As to what is *consent in writing* determined. *Coleman-Bush Investment Co. v. Figg, Trustee* . . . 404
9. As to when wife may be said to have *joined* in husband's deed determined. *Bankston, &c. v. Crabtree Coal Mining Co.* . . . 455
10. What is *contingent expense* of House of Representatives determined. *McDonald v. Norman, Auditor* . . . 593

Demurrer. Devise.

DEMURRER—

The defendant by filing a general demurrer to the petition entered his appearance. *Chaffin v. Fulkerson* 277

DEPOSITIONS—

Where exceptions to defendant's depositions upon ground that witnesses reside within twenty miles of the court house were improperly overruled by the lower court, and a verdict for plaintiff was set aside upon the ground that it was against the evidence, upon this appeal by plaintiff from a judgment upon a subsequent verdict for defendant, this court in determining whether judgment should be rendered for plaintiff upon the first verdict will not treat the case as if defendant's depositions had not been read, as defendant should have an opportunity to produce the witnesses at another trial. *Couadeau v. American Accident Co.* 280

DESCENT AND DISTRIBUTION—

As to contribution among devisees—See **CONTRIBUTION**.

As to inheritance and transmission of inheritance by bastards—
See **BASTARDS**.

An heir or devisee takes the land descended or devised to him free from any lien for debts due by him to the ancestor or testator. *Thompson, &c., v. Myers, &c.* 597

DEVISE—

As to execution of power of appointment by will—See **POWERS, 2**.

As to contribution among devisees—See **CONTRIBUTION**.

1. Under a devise by a testator to a father in trust for his children with "power to use the principal for his children, or any of them, equally or unequally," the father took a power of appointment which may be exercised by him so as to defeat the interest of any particular child, and therefore each child took only a contingent interest, and upon the death of one of them nothing passed to his heirs, the power of appointment not being affected or circumscribed thereby. *Lewis, &c., v. Citizens' National Bank* 79
 2. Where a testator has by a codicil to his will placed a construction upon a particular clause of his will, that construction must control. *Idem* 79
 3. By a devise of "what little property I have after the payment of my debts," the testator passed property which had been devised to him for life and after his death to such uses as he might appoint by will. *Payne, &c., v. Johnson's ex'ors* 175
 4. By such a devise the testator charged with the payment of his debts, the property held by him for life with power of appointment, as he had a right to do. *Payne, &c., v. Johnson's ex'ors* 175
 5. While a devise of an estate generally or indefinitely, with the power of
- Vol. 95--44

Devise.

DEVISE—Continued.

disposition, passes the fee, yet where the first taker is given an estate for life only, that express limitation will control the operation of the power and prevent it from enlarging the estate into a fee. *Idem* 175

6. Where money borrowed by a devisee was applied to the extinguishment of liens on the land devised, which had been created by the testator, that fact did not entitle the creditor to be substituted to the rights of the lienholder. Having taken indemnity from the devisee by way of mortgage, he obtained in that way all he bargained for. *Payne, &c., v. Johnson's Ex'ors* 175

7. The word "survivor" is a flexible term, and in determining whether as used in a will it is to be interpreted according to its strict and literal meaning, or so extended as to include the children of one who, if living, would be within its literal meaning, the intention of the testator, as gathered from the spirit and context of the will, must control.

Under a devise by a testator to several grandchildren, with the provision that if any of them should die without issue then living, his interest would go to the "survivor or survivors of them," upon the happening of the contingency the interest of the one dying will go to the survivors to the exclusion of the children of one who may be dead, it being further provided that if all should die without issue living at the time, the property shall go to the testator's surviving children "and the issue of such of them as now are or may then be dead." *The Coleman-Bush Investment Co. v. Figg, Trustee* 404

8. Under such a devise the grandchildren take a defeasible fee, and all of them having united in a conveyance of the land devised by which they relinquish all right and title to the land as survivors, the grantee acquires the fee, subject to be defeated (if at all) only in the event all the grantors shall die leaving no issue. As the children of the grantors can never take as "survivors," their failure to unite in the conveyance can not affect the title of the grantee. *Idem* . 404
9. One who claims land as devisee under a will may, for the purpose of showing the testator's title, prove the declarations of the testator as to a matter of pedigree, subsection 2 of section 606 of Civil Code not being intended to render such testimony incompetent. *Whalen v. Nisbet, &c.* 464

10. Where a testator, who owned a large distillery which he devised to his infant grandchildren, provided that the distillery should be operated by his executors for three years after his death in order to pay various bequests made by his will, "after which time I desire that my name be extinguished from the business," the words quoted were not intended to prohibit the devisees from using a valuable trade-mark of which the testator's name formed a part, and which he had used for

Devise.

DEVISE—Continued.

- many years, but merely to prohibit the use of his name in the operation of the distillery, after the expiration of the three years, in any way that might make his estate liable. *McBrayer, Ex'or, v. McBrayer's ex'trix* 475
11. What the testator may have said before or after the making of the will can not be looked to in its construction. The will must speak for itself. *Idem* 475
12. While the court perceives nothing illegal or contrary to public policy in a prohibition by the testator of the use of the trade-mark, or of the use of his name in connection with the manufacture of whisky, it is not necessary to determine the question as to the validity of such a prohibition. *Idem* 475
13. A provision in the will that if at any time the executors shall disagree as to the best method of settling up, managing and disposing of the testator's estate, the view held by the widow "shall in all cases be adopted," does not authorize the executors to adopt the widow's construction of the will without regard to the intent of the testator. *Idem* 475
14. Where a testator devised land to his two brothers, executors of the will, reciting that it was for the love and affection he had for them and also for their services in settling up the estate, there being a lien on the land, which, if discharged out of the estate, would leave nothing with which to pay legacies, a fact that must have been known to the testator, it necessarily follows that the testator intended the brothers to take the land *cum onere* and to release it from the existing lien with their own means and not by using assets of the estate. *Hedger, &c., v. Judy, &c.* 557
15. An heir or devisee takes the land descended or devised to him free from any lien for debts due by him to the ancestor or testator, such debts not being upon the same footing as advancements made to him. *Thompson, &c., v. Myers, &c.* 597
16. Where a devisee dies before the testator, his issue take as devisees directly under the will and not as his heirs-at-law, unless the will makes or requires a different disposition of the estate devised. *Idem* 597
17. Where a testator devised all his property to his widow and son "to share and share alike," except as to certain property specifically described, which was to belong to the widow for life, remainder to the son and his heirs, with the further provision that none of the real estate should be sold, "but remain for a perpetual investment, and only the revenue therefrom to be used," the widow and son took the fee-simple title to all the real estate, except that expressly devised to the widow for life, remainder to the son; and the prohibition against alienation being void, under section 27 of article 1, chap-

Devise. Divorce and Alimony.

DEVISE—Continued.

ter 63, General Statutes, the deed of the widow and son conveying to appellant a part of the land devised passes a good title, which appellant is required to accept under his contract with the grantors for the purchase of the land. *Ernst v. Shinkle* 608

DISMISSAL OF ACTION—

1. A plaintiff has the right to dismiss his action without prejudice at any time before final submission; and while the defendant can not be thereby precluded from maintaining any cause of action already pleaded as counter-claim or set-off, yet such right of the defendant exists only where the counter-claim or set-off has been filed in court while the action was pending and before the plaintiff has made a motion to dismiss it.

In this case plaintiff's motion to dismiss without prejudice was properly sustained, although after it was made, but before it was acted on, the defendant tendered an amended answer and counter-claim. And the dismissal being proper, a denial of the motion to file the amended answer and counter-claim was inevitable. *Northwestern Mut. Life Ins. Co. v. Barbour, &c.* 7

2. A rule of court requiring notice of motions does not apply to a motion by plaintiff to dismiss his action, as the Civil Code makes it imperative upon the court to sustain such a motion. *Idem* 7
3. After the court has sustained a motion by defendant for a peremptory instruction to the jury, but before such an instruction has been given, the plaintiff has a right to dismiss his action without prejudice, as there has been at that time no "final submission" of the case to the jury, within the meaning of subsection 1 of section 371 of the Civil Code. *Vertrees' adm'r v. Newport News, &c., Co.* 314

DISTILLERY—

As to prohibition by testator of use of name in connection with—
See DEVISE, 10, 12.

DIVISION OF LAND—See PARTITION.

DIVORCE AND ALIMONY—

1. The wife's right to alimony is not confined to cases in which the divorce is obtained in a suit instituted by her, although a strict construction of the statute would seem to so limit the right. The statute was intended to apply in all cases where the separation occurs without the wife's fault, and embraces cases where she is entitled to obtain a divorce, although the husband is seeking it.

In this action by the husband for a divorce upon the sole ground of his having lived apart from his wife without cohabitation for five consecutive years next before the institution of the action, as the wife

Divorce and Alimony.

DIVORCE AND ALIMONY—Continued.

- might have obtained the divorce by making the application, she, being without fault, was entitled to alimony. *Lacey v. Lacey* . . . 110
2. The objection that the wife's answer seeking alimony was not styled a "counter-claim," was waived by the plaintiff by replying and joining issue on the matter set up in the alleged counter-claim, if the requirement of the Code be applicable to cases of this kind. *Idem* 110
3. Even if the statute does not allow alimony to the wife in the action instituted by the husband for a divorce, because it would not be on a divorce obtained by her, or if the objection to the counter-claim was not waived, yet she is entitled to alimony in an independent suit brought by her for that purpose after the husband instituted his action, the two suits being consolidated and heard together. *Idem* 110
4. The only allowance to the wife was \$75 pending the suits. The extent of her estate seems to be about \$700. The husband seems to have gotten several hundred dollars of her separate property, and is worth \$2,500 or \$3,000. *Held*—That the wife should have been allowed as alimony the sum of one thousand dollars. *Idem* . . . 110
5. The provision of the statutes denying alimony to the wife, except "on a divorce obtained by her," was intended to apply only in that class of cases where a divorce obtained by the husband involves fault of the wife, and not in cases where either party may maintain the action without reference to which is in fault. Therefore, the wife was entitled to alimony in this case, although the divorce was obtained by the husband, the divorce being granted upon the ground that the parties had lived apart five years. And where the divorce is granted upon such a ground the husband should be required, as was done in this case, to pay costs of each party without inquiring whether the wife is in fault. *Newsome v. Newsome* 383
6. It would be oppressive in this case to require the husband to pay for the support of the wife \$400 annually during her life or widowhood, as she may in due course of nature live unmarried twenty years, while he can not be reasonably expected to earn money by his own labor more than a few years longer. He should, therefore, be permitted to pay whatever may be amount of allowance in a gross sum, and in a reasonable time; and under all the circumstances and in view of what he has already paid by order of court, the sum of \$1,000, payable as of the date of the judgment appealed from, would be reasonable, the estate of the husband, consisting of houses and lots, being worth about \$20,000, and the wife owning property given her by the husband worth \$2,500, and also \$500 in money. *Idem* . . . 383
7. In an action by the husband for divorce, in which he sought by his petition to cancel a deed made to the wife, through a trustee, upon the ground that it had been made solely in consideration or by rea-

 Divorce and Alimony. Ejectment.

DIVORCE AND ALIMONY—Continued.

son of marriage, an order having been made reciting that, on motion of plaintiff, the cause was "discontinued as to property," an order appended to the final decree of divorce reciting that "all property obtained by these parties in consideration of marriage is respectively restored to them" did not affect the rights of the wife to the property which had been in dispute in that action, whatever may ordinarily be the effect of such an order. *Bennett v. Bennett* 545

DOWER—

As to dower in partnership real estate—See **PARTNERSHIP**, 3.

1. Where a debtor has executed a deed of assignment for the benefit of his creditors his wife may by a deed subsequently executed by her alone pass her potential right of dower. *Shinkle's ass'ee v. Briatow*. 84
2. While dower is not an estate until assigned, an estate by the curtesy takes effect as a freehold estate immediately on the death of the wife. *Malone v. Conn, &c.* 93

DRUGGISTS—

As to application for druggist's license with privilege of selling liquor—See **LIQUOR SELLING**, 7, 8, 9.

As to right of druggists to sell liquor on prescription—See **LIQUOR SELLING**, 3, 4.

DYING DECLARATIONS—

1. Upon a trial for murder it was not competent for defendant to prove that another person had made a dying confession that he and not the accused killed the deceased. *Davis v. Commonwealth*. . . . 19
2. The statement of a dying person is competent as his dying declaration only when it relates to the manner and circumstances of the infliction upon him by another of personal injuries resulting in his death. *Idem*. 19

EJECTMENT—

- A petition in ejectment describing the land sought to be recovered as forty acres, a part of a certain survey described by metes and bounds, was sufficiently definite. But if not, as the plaintiff alleged that he did not know and could not ascertain the boundary of the forty acres, and called upon defendant to give it, the defendant failing to answer, the petition was properly taken for confessed, and judgment rendered for the recovery of the land, giving the boundary. *Chaffin v. Fulkerson*. 277

Election. Electricity.

ELECTION—

Where the death of one person is caused by the negligence of another and there is an interval of suffering between the time of injury and the time of death, the representatives of the decedent can not recover both for the suffering and the death, but must elect. *Hackett, adm'r, v. Louisville, &c., R. Co.* 286

ELECTIONS—

As to election by city council—See **OFFICERS**, 4.

1. The sale of liquor at any time during the twenty-four hours of an election day is a violation of the statute prohibiting such sale "upon the day" of any general or primary election. *Commonwealth v. Murphy* 88
2. Under section 167 of the Constitution of 1891, the terms of all city and town officers expired in November, 1893, as that section was intended to provide for the election at that time, not only of city officers whose election was specifically provided for by the Constitution, or by general laws enacted in conformity to its provisions, but also for the election of officers provided for by such city charters as might in November, 1893, be still in force by reason of the failure of the Legislature to pass a general law for the government of such cities. Therefore, the term of the treasurer of the city of Lexington, elected in March, 1892, expired in November, 1893, and his successor was then properly elected, although the city charter, which was continued in force by the Constitution (except so far as is inconsistent with its provisions), and which had not in November, 1893, been superseded by a general law for the government of cities of that class, fixed the term at two years. *Johnson v. Wilson* 415
3. In the absence of any provision in the election law prescribing the mode of serving notice of contest of election, it is to be presumed the Legislature intended it done according to section 625 of the Civil Code. *Broaddus v. Mason* 421
4. A contesting election board has power to go behind returns of officers of election at each precinct, and adjudicate and determine who was legally elected and entitled to an office, and where the ballots have been destroyed, parol evidence is admissible for the purpose of determining who was in fact elected. In this case the ballots were correctly counted, and a number of votes to which each candidate was entitled was ascertained, but officers of the election simply made a mistake in casting up or adding the votes together after the ballots were counted, the mistake being shown by a tally paper explained and corroborated by testimony of officers of election. *Held*—That the contesting board had power to correct the mistake. *Idem* 421
5. The canvassing board was not intended to perform any other than ministerial duties. *Idem* 421

ELECTRICITY—

As to right to operate street railway by—See **STREET RAILWAYS**.

Eminent Domain. Evidence.

EMINENT DOMAIN—

As to right of railroad company to destroy public highway in construction of its road—See **RAILROADS**, 5, 6.

EMPLOYER AND EMPLOYEE—See **MASTER AND SERVANT**.

EQUITIES—

In a contest between equities that which is prior in time must prevail.
First National Bank of Covington v. The D. Kiefer Milling Co. 97

EQUITY —

1. A court of equity has concurrent jurisdiction in matters of account which should be exercised when otherwise there may be serious doubt as to the true state of the accounts or difficulty in satisfactorily adjusting them and safely striking a balance. *O'Connor & McCulloch v. Henderson Bridge Co.* 633
2. Transfer to equity of an action for damages was not improper where the criterion of recovery required the consideration of various items of account involving prolix mathematical calculations. *Idem.* . . . 633

ESTATES—

As to estates for life—See **LIFE ESTATES**.

As to estate passed by conveyance—See **REMAINDERS**, 1, 2.

As to estate passed by devise—See **DEVISE**.

ESTATES OF DECEASED PERSONS—See **DECEDENT'S ESTATES**.

EVIDENCE—See DYING DECLARATIONS.

1. The fact that a witness is sworn and testifies entitles the adverse party to impeach his general reputation for truth without reference to the materiality of his evidence. *Davis v. Commonwealth* 19
2. It was competent to prove the bad reputation of a witness two years before the trial for the purpose of throwing light upon his reputation at the time of the trial. *Idem* 19
3. In the contest of a will upon the ground of want of testamentary capacity on the part of the testatrix, letters written by the testatrix to one of the devisees were competent evidence to show her feelings toward the devisee to whom they were addressed, and her intimacy with her. *Johnson, &c., v. Stivers, &c.* 128
4. Upon the trial of appellant for murder, although a conspiracy between him and his co-defendants was charged, the court properly refused to allow him to prove the good character of his co-defendants. *Omer v. Commonwealth* 353
5. The court did not err in refusing to allow the alleged co-conspirators to testify in behalf of appellant. *Idem* 353
6. The deceased being one of a party which had abducted a friend of the defendants', testimony to the effect that some one in the excited crowd that gathered just after the abduction cried out, "Go for

Evidence. Executors and Administrators.

EVIDENCE—Continued.

- William Omer" (the appellant), was incompetent and prejudicial, neither appellant nor any of his co-defendants being present at the time. *Idem* 353
7. The abduction being made for the purpose of forcing the person abducted to marry the deceased, what was said and done on the occasion of the attempt to consummate the marriage was not competent evidence, neither the appellant nor any of his co-defendants being present. *Idem* 358
8. One who claims land as devisee under a will may, for the purpose of showing the testator's title, prove the declarations of the testator as to a matter of pedigree, subsection 2 of section 606 of the Civil Code not being intended to render such testimony incompetent. *Whalen v. Nisbet, &c* 464
9. It is competent to prove the statements of dead persons as to where corner and line trees which are gone originally stood, and also to show the relative location and calls of adjoining surveys patented subsequent to the date of the patent in question. *Idem* 464
10. Declarations of a testator before or after the making of the will can not be looked to in its construction. *McBrayer's ex'or v. McBrayer's ex'trix* 475
11. Upon the trial of appellant for murder, the court erred in permitting a witness to testify that some time after the occurrence the accused came to her house, excited and seemingly afraid of being killed, and said he was a shooting man and had killed two men, the fact that the appellant did the shooting not being questioned. *Eversole v. Commonwealth* 628

EXCESSIVE VERDICT—See VERDICTS, 1.

EXECUTIONS—

As to parties to proceeding for recovery of land purchased by administrator at execution sale—See EXECUTORS AND ADMINISTRATORS, 1.

- The levy of an execution upon land which has been sold by the debtor in good faith gives the creditor no lien upon the land or upon the unpaid purchase money due by the purchaser, and the purchaser not being restrained, has the right, notwithstanding such a levy, to pay the money to the debtor. *Cooper v. Arnett, &c* 608

EXECUTORS AND ADMINISTRATORS—

1. An administrator may without joining the heirs proceed by notice and motion for the recovery of land which he has purchased at a sale made under execution in his favor as administrator, as land thus purchased by an administrator may be treated as personalty until his duty touching it is performed, and that duty is to collect and hold its proceeds for distribution among the heirs or for the payment

Executors and Administrators. Frauds, Statute of.

EXECUTORS AND ADMINISTRATORS—Continued.

- of debts. But while the heirs were not necessary parties to such a proceeding instituted by the administrator, the execution defendant can not complain that they were substituted as plaintiffs for the administrator. *Jackson, &c., v. Roberts' adm'rs* 410
2. The use of the word "administrator" after the name of the grantee in a sheriff's deed must, if technical rules are to be applied, be considered as merely a description of the person. *Idem* 410

EXEMPTIONS—

From taxation—See **TAXATION**, 1.

FALSE PRETENSE—See **OBTAINING MONEY BY FALSE PRETENSES**.

FEDERAL COURTS—

As to removal of causes from State courts—See **TRANSFER OF SUITS**, 3, 4, 5.

FELLOW-SERVANTS—See **MASTER AND SERVANT**, 1.

FINAL ORDER—See **APPEALS**, 8.

An order of reference to a commissioner in a trade-mark case with directions to take an account of profits is merely interlocutory. *Geo. T. Stagg Co. v. E. H. Taylor, Jr., Co.* 651

FRAUD—

As to procurement of married woman's execution of mortgage by fraud—See **MORTGAGES**, 4.

FRAUDULENT CONVEYANCES—

As to gifts by father to his children—See **VOLUNTARY CONVEYANCES**.

FRAUDS, STATUTE OF—

1. A verbal sale of land is void and confers upon neither party any equitable interest whatever, but only such collateral equities as may arise out of the transaction, such as giving the purchaser a lien on the land for the purchase money paid, if the possession has been transferred pursuant to the verbal purchase. *Asher v. Brock, &c.* 270
2. In an action to enforce a parol contract for the sale of land, although the admission of the contract by the vendor in his answer be treated as a written confirmation of the sale, it can not relate back to the date of the parol contract so as to overreach an intervening sale and conveyance of the land to another, even though the person to whom the land has been thus sold and conveyed purchased with notice of the prior parol contract. But the parol purchaser may assert a lien

Frauds, Statutes of. General Statutes.

FRAUDS, STATUTE OF—Continued.

on the land for the purchase money he has paid, provided he obtained possession of the land by reason of his purchase, and the subsequent purchaser had notice of his equity at the time he purchased.

Idem 270

3. A verbal agreement between husband and wife, whereby the husband was to retain possession and use of the wife's farm for his life after her death, is within the Statute of Frauds. *Nall, &c., v. Miller* 448
4. A writing signed by defendants authorizing a firm of real estate brokers to offer plaintiff a named sum for a city lot, specifically described, is equivalent to a written offer by defendants themselves to plaintiff, and the plaintiff having written at the bottom of the instrument his acceptance of the offer, the two writings together constitute a sufficient memorandum to satisfy the requirements of the Statute of Frauds. And the acceptance being unconditional, it is not material that it was never delivered to the defendants or to any one for them. *Alford v. Wilson, &c.* 506

GENERAL STATUTES—

Provisions cited, construed, &c.

Chapter 15, art. 1, secs. 1, 3	594, 595
Chapter 22, sec. 1	510
Chapter 23, sec. 6	398
Chapter 24, sec. 10	4, 103
Chapter 24, sec. 20	89
Chapter 26, sec. 28	384
Chapter 29, art. 13, sec. 2	304
Chapter 31, sec. 5	307
Chapter 31, sec. 9	308
Chapter 31, sec. 15	599
Chapter 38, art. 12, sec. 9	412
Chapter 44, art. 1, sec. 8	600
Chapter 44, art. 2, sec. 1	145
Chapter 52, art. 3, sec. 1	385
Chapter 52, art. 4, sec. 15	364
Chapter 56, sec. 14	496
Chapter 57, sec. 3	237
Chapter 63, art. 1, sec. 22	88
Chapter 63, art. 1, sec. 27	611
Chapter 71, art. 1, sec. 1	457
Chapter 71, art. 1, sec. 2	458
Chapter 71, art. 1, sec. 6	459
Chapter 81, sec. 17	434
Chapter 92	66, 67
Chapter 92, art. 9, secs. 16, 17	274

General Statutes. Homestead.

GENERAL STATUTES—Continued.

Chapter 113, sec. 5	468
Chapter 113, sec. 18	598
Chapter 113, sec. 28	469
Chapter 113, sec. 30	467

GIFTS—

The fact that stock which constituted a trust fund was paid for by a debtor in part out of his own means as a gift to the beneficiaries, who were his children, does not give his creditors the right to subject any part of the fund, as he was at the time of the gift in a prosperous pecuniary condition. *Shinkle's ass'ee v. Bristow* 84

GUARDIAN AND WARD—

Where the property of wards had been enhanced in value by improvements erected under a contract made by the guardian in good faith for the benefit of the wards, and it was held upon a former appeal that, although the guardian had no power to make the contract, the contractors might subject the rents of the property to the payment of the actual cost of the improvements to the extent that they had been increased by reason of the improvements, the fact that it now appears that by reason of the decline in business or from other causes there has been such a falling off in the rents that they are very little in excess of what they were prior to the making of the improvements, does not entitle the contractors to apportion the rent so as to throw upon the infants any part of the burden of the loss. The contractors can subject only the amount in excess of that which the property yielded before the improvements were made. *Bent & Co. v. Barnett, &c.* 499

HEIRS—

As to inheritance and transmission of inheritance by bastards—
See **BASTARDS**.

Heirs not necessary parties to motion by administrator for recovery of land purchased by him at execution sale—See **EXECUTORS AND ADMINISTRATORS**, 1.

An heir takes land descended to him free from any lien for debts due by him to the ancestor. *Thompson, &c., v. Myers, &c.* 597

HOMESTEAD—

1. Where a debtor has sold his homestead and invested the proceeds in another homestead, it is not necessary in order to entitle him to the exemption of the new homestead, as against a debt created prior to the purchase of the new homestead but subsequent to the purchase of the original homestead, that he should allege that the sale was made with the intention to reinvest the proceeds in another homestead. It is sufficient that the reinvestment has in fact been made. *Cooper v. Arnett, &c.* 608

 Homestead. House of Reform.

HOMESTEAD—Continued.

2. Where a debtor owning land worth more than one thousand dollars, out of which he is entitled to the exemption of a homestead, sells it and invests one thousand dollars of the proceeds in another homestead, applying the surplus to the payment of his debts, he has the right to the exemption of the new homestead as against debts as to which the original homestead was exempt. Whether he would be entitled to the exemption if, instead of applying the surplus proceeds to the payment of his debts, he still retained the money, is a question not presented. *Idem* 603

HOMICIDE—

1. As it appeared upon the trial of appellant for murder that he said nothing and did nothing at the time of the killing, the case against him rests on the intent with which he was present, as he is guilty of murder only in the event his companions were so guilty, and he was present in pursuance of a mutual understanding to carry out some unlawful purpose. Therefore, it was error to give an instruction which authorized the jury to acquit only in the event some one of the appellant's companions fired upon the party of the deceased without the "knowledge or assent" of the appellant, as the "knowledge" imputed in the instruction is the knowledge of the firing at the time it occurred, the hypothesis upon which the instruction was based precluding the idea that a previous knowledge was meant. *Omer v. Commonwealth* 353
2. Although a conspiracy between appellant and his co-defendants was charged the court properly refused to allow him to prove the good character of his co-defendants. *Idem* 353
3. The court did not err in refusing to allow the alleged co-conspirators to testify in behalf of appellant. *Idem* 353
4. The deceased being one of a party which had abducted a friend of the defendants', testimony to the effect that some one in the excited crowd that gathered just after the abduction cried out, "Go for William Omer" (the appellant), was incompetent and prejudicial, neither appellant nor any of his co-defendants being present at the time. *Idem* 353
5. The abduction being made for the purpose of forcing the person abducted to marry the deceased, what was said and done on the occasion of the attempt to consummate the marriage was not competent evidence, neither the appellant nor any of his co-defendants being present. *Idem* 353
6. The omission of the word *feloniously* from an instruction as to murder was not prejudicial error. *Idem* 353

HOUSE OF REFORM—

As to right of action against for assault upon inmate by employe
—See CHARITABLE INSTITUTIONS.

Husband and Wife.

HUSBAND AND WIFE—

As to failure of clerk to examine wife separately and apart from her husband in taking acknowledgment—See MORTGAGES, 3.

As to procurement of wife's execution of mortgage by fraud—See MORTGAGES, 4.

As to limitation of action to recover land which wife has made ineffectual attempt to convey—See LIMITATION, 2, 3, 4.

1. Under an ante-nuptial contract by which it was provided that "each party to this contract is to have, enjoy and use their own property which they own free from the interference of the other and to have the perfect right to sell, convey or otherwise dispose of the same as though no marriage had taken place," not only was each party excluded from any interest in the estate of the other during their joint lives, but upon the death of one the other was to have no interest in his or her estate. *Biggerstaff's ex'ors v. Biggerstaff's adm'r* 154
2. Where the wife, by reason of such a contract, had no interest in her husband's estate upon his death, neither she, during her life, nor her administrator after her death, had any right to appeal from an order of the county court admitting his will to probate. *Idem*, 154
3. Where husband and wife executed a lease upon the wife's property for a term of twenty-five years, the lessees obligating themselves to erect certain improvements, the agreement of the lessors to take and pay for the improvements, giving a lien on the property to secure the payment, was not a collateral undertaking but a direct and positive one, and therefore binding on the wife. *Bullock, &c., v. Grinstead & Co.* 261
4. Even though the wife had no power to bind herself personally, the husband was personally bound and the wife had the power to bind her estate by mortgage to secure his obligation; and the lease, in so far as it created a lien, was in effect a mortgage. And it is not material that the obligation was to take effect in future. *Idem*, 261
5. Bank stock held by a married woman in her name is not her separate estate under section 15, article 4, chapter 52, General Statutes, unless there is some indication or expression on the face of the certificate or transfer-book of such stock to the effect that it is for her "use." The requirement of the statute, that it shall be expressed "that it is for the use of such female," means the same thing as the requirement of the former statute that it should be expressed to be for her "exclusive use." *Louisville Gas Co. v. Clay* 363
6. Equity will not imply a promise by the wife to pay the husband for improvements or repairs on her land while used and enjoyed by him in virtue of his marital rights, nor even for money advanced to remove an incumbrance from it. And the wife's land should never be subjected to satisfy the husband's demand for services rendered or

Husband and Wife. Incest.

HUSBAND AND WIFE—Continued.

- money advanced on account of it, though such claim be founded upon an express agreement with her, if either he has received rents and profits of equal value, or she has left at her death sufficient personal estate to pay it. *Nall, &c., v. Miller* 448
7. A verbal agreement between husband and wife, whereby the husband was to retain possession and use of the wife's farm for his life after her death, in consideration of repairs and improvements made thereon during their coverture, is not enforceable, because it is within the statute of frauds, and also because it was without consideration, as the husband was not entitled to charge for improvements and repairs on the farm, the use and enjoyment of it being full compensation. *Idem* 448
8. Money obtained by a firm, composed of father and sons, after it became involved, from the wife of one of the sons through her husband, and always recognized by the firm as the wife's money, and for the greater part of which a note was executed by the firm to the wife, must be regarded as the wife's separate estate, the husband being a member of the firm by which the note was executed; and the father, for the purpose of securing the son's wife and paying other debts of the firm, having sold and conveyed his individual property to the husband, reciting as a part of the consideration the debt due the wife, the property thus conveyed must be regarded as held in trust by the husband for the wife to the extent of the debt due her; and in this action for the settlement of the husband's estate under an assignment for the benefit of his creditors, the wife is entitled, out of the proceeds of the property, to the amount of the debt due her. *Hill, &c., v. Cornwall & Bro.'s ass'ee*. 512

IMPEACHMENT OF WITNESS—See WITNESSES, 1, 2.

IMPROVEMENTS—

As to liability of wife's estate for improvements put upon it by husband—See HUSBAND AND WIFE, 6, 7.

As to liability of ward's estate for cost of improvements put upon it under contract with guardian—See GUARDIAN AND WARD.

1. Substantial five-story brick structures erected by a lessee to be purchased by the lessor upon the expiration of the lease are to be regarded as a part of the realty and not as personal estate. *Gray v. Cornwall's ass'ee* 566
2. The equitable mode of arriving at the value of improvements is to take their value relative to that of the lot upon which they stand. *Idem* 566

INCEST—

Under an indictment for incest alleged to have been committed by the defendant with his daughter the jury were authorized to convict upon

Incest. Instructions to Jury.

INCEST—Continued.

the testimony of the daughter alone, as she can not be regarded as an accomplice. *Whittaker v. Commonwealth* 632

INDICTMENT—

1. The provision of the Code requiring an indictment to be indorsed "a true bill" is mandatory and not merely directory, and if an indictment is not so indorsed it is not a valid indictment and should be dismissed on demurrer. *Oliver v. Commonwealth* 372
2. An indictment having been transferred from the court in which it was found to another court upon motion by the Commonwealth for a change of venue, the former court was divested of jurisdiction and a subsequent indictment found in that court for the same offense and all proceedings under it were void. *Smith v. Commonwealth* . 322
3. While it is essential to the validity of an indictment that it should be indorsed "a true bill," and that indorsement signed by the foreman, the clerk's indorsement of the filing of the indictment is not essential, and when it has been omitted, it may be supplied at a subsequent term, and even after the jury has been sworn and a witness examined. *Pence v. Commonwealth* 618
4. An indictment accusing the defendant of the offense of cutting a named person "with intent to kill him" need not, in stating the particular circumstances of the offense, again charge that the cutting was done "with intent to kill." *Shouse v. Commonwealth* 621

INDUSTRIAL SCHOOL OF REFORM—See CHARITABLE INSTITUTIONS.

INFANTS—

As to jurisdiction of chancellor to order sale of infants' real estate—See SALES OF INFANTS' REAL ESTATE.

Word *infants* in statute of descents applied alone to infants born in lawful wedlock. *Blankenship, &c., v. Ross* 306

INJUNCTIONS—

As to effect of supersedeas on order dissolving—See PROHIBITION, 2.

As to right to enjoin construction of electric street railway—See STREET RAILWAYS, 2, 3.

As to injunction to prevent use of trade-mark—See TRADE-MARK.

INJUNCTIONS—

INSTRUCTIONS TO JURY—

As to instructions as to self-defense—See SELF-DEFENSE.

As to when court may give peremptory instruction—See PEREMPTORY INSTRUCTION.

Instructions to Jury. Judgments.

INSTRUCTIONS TO JURY—Continued.

The failure of the court, in instructing the jury as to murder, to require them to find that the killing was "feloniously" done in order to convict of that offense, was not prejudicial error in this case. *Omer v. Commonwealth* 858

INSURANCE—See ACCIDENT INSURANCE.

INTEREST—

As to interest on earnings pledged by lessee of railroad—See RAILROADS, 12.

Plaintiffs are entitled to interest on aggregate of principal and interest from date motion for judgment for undisputed amount was made and improperly overruled. *O'Connor & McCulloch v. Henderson Bridge Co* 638

JOINDER OF ACTIONS—

As to right of administrator to sue for both death and suffering of intestate—See NEGLIGENCE, 2.

JOINT OWNERS—

1. Where there has been an assignment for creditors by one of two joint owners of real estate, a creditor can not maintain an action for the sale of the property under section 490 of Civil Code. The right of action is in the assignee, the legal title being in him. *Hill, &c. v. Cornwall & Bro.'s ass'ee* 512
2. When one has purchased a half interest in property upon which he has an equitable lien for the value of the improvements, the property being indivisible, he has the right to have it sold under section 490 of the Civil Code, and incidentally to make the other joint owner satisfy his lien for one-half the value of the improvements. *Gray v. Cornwall's ass'ee* 566
3. It being evident that a sale must be made in any event, it was not error to order a sale before ascertaining the value of the improvements. *Idem* 566

JUDGMENTS—

As to effect of reversal of judgment under which sale has been made—See PARTIES TO ACTIONS, 1.

As to conclusiveness of order probating foreign will—See WILLS, 8, 9.

1. A judgment against non-resident defendants will not be treated as void after the lapse of almost fifteen years, although the required affidavit had not been made at the time the warning order was made, as the petition containing a statement of all the facts required to authorize the warning order was sworn to after the order was made and at least a year before judgment was rendered, and the warning order attorney and the court acted upon the warning order

Judgments. Jurisdiction.

JUDGMENTS—Continued.

- after the affidavit was made, and, besides, the warning order itself recites that it was made upon proof as to the non-residence of the defendants. *Wilson, &c., v. Teague* 47
2. Where the record in which a judgment was rendered shows the service of a summons, whether actual or constructive, it imports absolute verity, and the judgment is conclusive until vacated or reversed in some direct proceeding. *Sears' Heirs v. Sears' Heirs* 173
3. A judgment rendered pursuant to a warning order made by the clerk in due form will not be declared void in a collateral proceeding merely because the jurat of the affidavit for the warning order was not signed by an officer. *Idem* 173
4. Upon return of case from Court of Appeals it was error to overrule motion for judgment for amount which Court of Appeals had held plaintiffs were entitled to recover in any event, and plaintiffs should, when case goes back again, have judgment for aggregate of principal and interest to date the motion for judgment was made, with interest on the whole from that date. *O'Connor & McCulloch v. Henderson Bridge Co.* 633

JUDICIAL SALES—

Exception to general rule that reversal of judgment does not affect the title of the purchaser at a sale made under the judgment—
See PARTIES TO ACTIONS, 1.

- In an action for the sale of property owned jointly by the plaintiff with defendant and upon which plaintiff had an equitable lien for the value of the improvements it was not error to order a sale before ascertaining the value of the improvements, it being evident there must be a sale in any event. *Gray v. Cornwall's ass'ee* 566

JURIES—See JURY TRIALS.

1. Where the jury commissioners were required to and did place in the drum or wheel-case less than the required number of names from which to select grand and petit jurors, one who was tried and convicted by a jury made up from the list of petit jurors thus obtained is entitled to a new trial, although it does not directly or certainly appear that he was substantially prejudiced thereby. *Risner v. Commonwealth* 539
2. There having been a failure to appoint jury commissioners at the previous term of the court, it was in the power of the court to then proceed to obtain grand and petit jurors in the mode prescribed by the statute, and to that end to appoint jury commissioners. *Idem* . 539

JURISDICTION—

As to removal of causes from State courts to United States Court—
—See TRANSFER OF SUITS, 3, 4, 5.

As to right to writ of prohibition—See PROHIBITION.

 Jurisdiction. Landlord and Tenant.

JURISDICTION—Continued.

Where an indictment found in the Perry Circuit Court was, upon motion by the Commonwealth for a change of venue, transferred from that court to the Clark Circuit Court, the jurisdiction of the Perry Circuit Court over the subject matter was thereby divested, and a subsequent indictment found in that court against defendant for the same offense, and all proceedings under it, were void, the case never having been remanded from the Clark Circuit Court. *Smith v. Commonwealth* 322

JURY TRIALS—

As to right to—See **TRANSFER OF SUITS**, 1, 2.

The right of trial by jury can not be impaired or modified by legislative enactment. *O'Connor & McCulloch v. Henderson Bridge Co.* . 638

KENTUCKY STATUTES—

Provisions cited, construed, etc.

Section 340	594
Section 342	594
Section 1223	385
Section 1575	39
Section 1777	589
Section 2241	542
Section 2242	542
Section 2243	543
Section 4193	233
Section 4205	233

KUKLUX LAW—

Section 1223 of the Kentucky Statutes is to be regarded not merely as an amendment to the act of April 11, 1878, known as the "Kuklux law," but as a substitute for the entire act. *Buchannon v. Commonwealth* 334

LAND—

As to validity of patent—See **PATENTS**.

LANDLORD AND TENANT—

As to construction of lease of railroad—See **RAILROADS**, 10, 11.

As to stipulation in lease that lessee is to have option to purchase—See **OPTIONS**.

1. Where husband and wife executed a lease upon the wife's property for a term of twenty-five years, the lessees obligating themselves to erect certain improvements and the lessors to have the option at the end of the term to take the improvements at a valuation to be fixed by referees, or to renew the lease on the same terms and conditions for an additional twenty-five years, time was of the essence of the

 Landlord and Tenant.

LANDLORD AND TENANT—Continued.

- contract giving the right of election to renew, and the lessors by failing to make their election on the day the term expired lost their right to force a renewal of the lease, and became bound for the value of the improvements according to the terms of the lease. *Bullock v. Grinstead & Co* 261
2. The term having commenced on the first day of June, 1867, expired on the first day of June, 1892, and that was the last day for making the election. *Idem* 261
 3. The agreement to take and pay for the improvements, giving a lien on the property to secure the payment, was not a collateral undertaking, but a direct and positive one, and was therefore binding on the wife. *Idem* 261
 4. Even though the wife had no power to bind herself personally, the husband was personally bound, and the wife had the power to bind her estate by mortgage to secure his obligation; and the lease, in so far as it created a lien, was in effect a mortgage. And it is not material that the obligation was to take effect in future. *Idem* 261
 5. When improvements are erected by a lessee under an agreement by the lessor to purchase them at expiration of lease, the lessee has an equitable lien for their value; and although the lease provides that it is to be renewed until the lessors can purchase at a valuation fixed by referees, or until a settlement can be made, that time must have some limit. *Gray v. Cornwall's ass'ee* 566
 6. The lessee having purchased from the lessors a one-half interest in the property, he owns the property jointly with the appellant, who has purchased from the lessors the other half, which he holds subject to the lessee's lien for one-half the value of improvements; and as each owner has a vested estate in possession and the property is indivisible, the lessee, or his assignee, has the right to have the property sold under section 490 of the Civil Code, and incidentally to make appellant satisfy his equitable lien for one-half the value of the improvements. But even if the fee is in the lessee to one-half the lot and all the buildings, the appellant owning one-half the ground alone, it can make no difference, the result being the same. *Idem* 566
 7. The buildings, which are substantial five-story brick structures, are to be regarded as a part of the realty. But whether they are personal or real estate is immaterial, the chancellor in either case having jurisdiction to order the sale. *Idem* 566
 8. The equitable mode of arriving at the value of the improvements is to take their value relative to that of the lot upon which they stand. *Idem* 566
 9. It being evident that a sale must be made in any event, it was not error to order a sale before ascertaining the value of the improvements.

Landlord and Tenant. Liens.

LANDLORD AND TENANT—Continued.

The chancellor, when he has the fund in his hands, hearing proof as to the character and condition of the buildings at the date of the sale, will be better able to fix a just basis of value. *Idem* . . . 566

LEASE—See LANDLORD AND TENANT.

LEGISLATURE—

As to powers of—See CONSTITUTIONAL LAW.

As to acts taking effect from first day of session—See STATUTES, 8.

As to claims for “contingent expenses” of—See CLAIMS AGAINST STATE.

LIBEL—

1. Animadversion upon the conduct of a public officer, however severe, is not libelous if it be confined within the limits of fair and reasonable criticism and based on facts.

In this action to recover damages for a newspaper publication criticising the plaintiff's conduct as election supervisor, the court properly instructed the jury “that if they believed the statements contained in the publication were substantially true as published, or were reasonable and fair criticisms of the acts and conduct of the plaintiff as supervisor, and were made in good faith without malice, then they should find for the defendant.” *Vance v. Louisville Courier-Journal Co* 41

2. The jury were the judges of the reasonableness of the grounds upon which the newspaper charges were based. And the evidence was sufficient to authorize the jury to find that there were reasonable grounds upon which to base the charge, in the publication complained of, that plaintiff, a Republican supervisor, had in every way interfered with the polling of Democratic votes, and that he would be arrested on the charge of bribery. *Idem* 41

LICENSE—

As to application for druggists' license with privilege of selling liquor—See LIQUOR SELLING, 7, 8, 9.

Contract between railroad companies as to connection of tracks not a mere license revocable at pleasure—See RAILROADS, 17.

LIENS—

As to devise of land with lien upon it—See DEVISE, 14.

As to execution lien—See EXECUTIONS.

1. A promissory note reciting that it was for money advanced “to help pay for a house and lot on Jefferson street, between Twenty-second and Twenty-third, and on which she (the payee) holds a lien until paid” was not sufficient to create a lien as against third parties, even with notice of the existence of the writing, it being manifest, not only from the note itself, but from the allegations of the pleadings, that

 Liens. Limitation.

LIENS—Continued.

- the lien was to be created by some subsequent agreement. *Schmidt v. Carter's adm'r* 1
2. Where money borrowed by a devisee was applied to the extinguishment of liens on the land devised which had been created by the testator, that fact did not entitle the creditor to be substituted to the rights of the lienholder. Having taken indemnity from the devisee by way of mortgage, he obtained in that way all he bargained for. *Payne, &c., v. Johnson's ex'ors* 175
3. An heir or devisee takes the land descended or devised to him free from any lien for debts due by him to the ancestor or testator. *Thompson, &c., v. Myers, &c.* 597

LIFE ESTATES—

- While a devise of an estate generally or indefinitely, with the power of disposition, passes the fee, yet where the first taker is given an estate for life only, that express limitation will control the operation of the power and prevent it from enlarging the estate into a fee. *Payne, &c., v. Johnson's ex'ors* 175

LIMITATION -

As to limitation of suit by city for taxes—See TAXATION, 2.

1. The right of a devisee to contribution from his co-devisee where he loses by paramount title a part of the land devised does not exist until there is an eviction, and limitation does not begin to run until then. *Jones, &c., v. Bigstaff, &c.* 395
2. Since the statute of 1846 the husband has had no vendible interest in the wife's land, and as a deed executed by the husband in 1871, attempting to convey the land of the wife, in which the name of the wife appeared only in the attesting clause, and then for the purpose, as recited, of relinquishing dower, must be regarded as the deed of the husband alone, it passed no interest to the grantees, and the wife's right of action accrued at once upon their entry. *Bankston, &c., v. Crabtree Coal Mining Co.* 455
3. Where one to whom a cause of action for the recovery of land accrues is at the time under the disability of infancy or coverture, action can be brought after the lapse of fifteen years only in the event it is brought within three years after the removal of the disability. And where the disability is removed as much as three years before the expiration of the fifteen years, it would seem that the right to sue should be limited to fifteen years, as in cases where there has never been any disability. But even if three years after the expiration of the fifteen years is to be allowed, the action in this case is barred. *Idem.* 455
4. If the conveyance in this case be regarded as one in which the wife

Limitation. Liquor Selling.

LIMITATION—Continued.

"joined" within the meaning of section 6 of article 1, chapter 71, General Statutes, her right of action was barred after the lapse of three years from the removal of the disability, without regard to whether fifteen years had elapsed since the cause of action accrued, there being sufficient evidence to support the finding of the lower court that the plaintiff was twenty-one years of age at the time the deed was executed. *Idem* 455

LIQUOR SELLING —

As to repeal of local option law — See STATUTES, 9, 10.

1. The sale of liquor at any time during the twenty-four hours of an election day is a violation of the statute prohibiting such sale "upon the day" of any general or primary election. *Commonwealth v. Murphy* 38
2. Where a prohibitory liquor law provides that it shall not apply "to a regular resident practicing physician who in good faith prescribes liquor to his patient," and then provides that "any physician who shall furnish spirituous, vinous or malt liquors to any person except as a medicine, shall be fined one hundred dollars for each offense," the latter provision must be regarded as providing merely for the punishment of the offense of "prescribing" liquors for other than medicinal purposes; a physician who "furnishes" liquor to another to be drunk as a beverage being subject to the punishment prescribed for "any person" who shall "sell, barter, give, loan or traffic" in spirituous, vinous or malt liquors. Therefore the act is not liable to the objection that it prescribes for the same offense one punishment as to physicians and a different and severer punishment as to all other persons. *Commonwealth v. Day* 120
3. Authority to the physician to prescribe liquors gives to the druggist, but to no other person, implied authority to fill the physician's prescription. *Idem* 120
4. Each sale or prescription must be accompanied by a distinct prescription, and a person can not obtain such liquors from the druggist or physician on a prescription indefinite as to quantity or so general as to cover future deliveries. *Idem* 120
5. Although the act provides that one person shall not procure such liquors for another to be used as a beverage, one person may act as the agent of another in having a prescription filled. The sick man to whom the prescription is given is not required to go after the liquor in person. *Idem* 120
6. When such a law provides by its first section that "it shall be unlawful for any person to sell, barter, give, loan or traffic in spirituous, vinous or malt liquors," and by a subsequent section provides that "the procuring for, or delivery by one person of liquor to another,

Liquor Selling. Mandamus.

LIQUOR SELLING—Continued.

unless a member of the same family, or their invited guests at their own household, to be drunk as a beverage, shall be deemed a sale under the provisions of the first section of the act, and subject the party procuring or delivering the same to the penalties annexed for a violation of said section," the latter section is not to be regarded as a limitation upon the first section, but as an addition to it, and as providing for the punishment of one who procures such liquors for, or delivers them to, another, to be drunk as a beverage, although he may not sell, barter, give or loan such liquors, or traffic in them, within the ordinary meaning of those terms. *Idem* 120

7. The statute which requires notice of an application to sell liquor by retail to be posted for ten days at the court house and four other places does not apply to an application for druggist's license with privilege to sell liquors. *Evans v. Commonwealth* 281
8. As appellant, upon a motion by him before the county judge for a druggist's license, with privilege to sell liquors, testified that he had sold spirituous liquors in violation of law since the present revenue law went into effect; that he could not tell the number of times that he had done so, and that during the fourteen years he had been in business he or his clerk had been indicted at nearly every court for the illegal sale of liquor, the court properly refused a license, it being easily inferable that the applicant was not a druggist in good faith, but had assumed the name or business for the purpose of retailing liquors. *Idem* 281
9. When the applicant for such a license has, within six months next preceding the application, been selling without the license, the statute makes it the duty of the judge to refuse the license, unless the applicant will, in addition to the regular license tax, pay a sum equal to 20 per cent thereof. *Idem* 281

LOCAL OPTION—

As to construction of prohibitory liquor law — See **LIQUOR SELLING**, 2-6.

As to repeal of local option law by act submitting question to voters—See **STATUTES**, 9, 10.

LOUISVILLE INDUSTRIAL SCHOOL OF REFORM—

See **CHARITABLE INSTITUTIONS**.

MANDAMUS—

- A motion in the Court of Appeals for a mandamus is the proper remedy to compel the lower court to grant an appeal in cases where the party complaining is entitled to an appeal. *Kelly v. Toney*, Judge 338

Mandate. Master and Servant.

MANDATE—

As to form of mandate of Court of Appeals in contested will case—See *WILLS*, 6.

As to proper mandate where lower court has erred in granting new trial—See *NEW TRIAL*, 3.

MARRIED WOMEN—See HUSBAND AND WIFE.**MASTER AND SERVANT—**

As to liability of master for act of servant—See *RAILROADS*, 1, 2.

As to liability of railroad company for injury to employes—See *RAILROADS*, 3, 14, 18-20.

1. A master is not liable for an injury to one of his servants by the negligence of another servant of the same grade or rank and engaged in the same field of labor, although the negligence was gross.

The members of a crew of workmen engaged under the employment of a railroad company in driving piles on the road of the company were co-equals in the same field of labor, and therefore the company is not liable for an injury to one of the crew by the negligence of another. *Volz v. Chesapeake, &c., R. Co.* 188

2. Where an employe by his dishonest practices compels his employer to discharge him, he is to be treated as having voluntarily refused to comply with his contract, and is liable in damages to his employer for the breach of contract. *Fuqua & Smith v. Massie & Sons* 387

3. Where an employe under contract to perform services for a stipulated time is wrongfully discharged by his employer before the expiration of his term of service, the measure of damages is the contract price less what the discharged employe has earned or might by reasonable diligence have earned. And as the law does not imply loss of time and employment by reason of the discharge, the discharged employe must, in order to recover more than nominal damages, allege and prove that he has, after reasonable effort, failed to find employment, or, finding it, is not paid as much as he would have received for like services under the contract. And if the discharged employe sues before the expiration of the contemplated term of service, he takes the risk of not being able to fix the damage or loss with certainty; he must lay the basis as best he can upon which the jury may assess the damages, and while it will be only an approximation, it is the most that can be required. *John C. Lewis Co. v. Scott* . . . 484

4. Where a servant has actually operated and seen others operate an implement or machine often enough to enable him, by the exercise of ordinary intelligence and care, to learn how to avoid being injured by it, or where the mode of operating it is so simple as that a person of ordinary intelligence or care can at once perceive the safe and proper mode of operating it, there is no duty resting upon the master to instruct him. *Jones v. Lou. & Nash. R. Co.* 576

Mayors. Motions.

MAYORS—

As to power of to employ counsel—See **TOWNS AND CITIES**, 1.

MISTAKE—

As to power of contesting board to correct mistake of officers of election in adding votes—See **ELECTIONS**, 4.

As to mistake of clerk in certifying acknowledgment of married woman—See **MORTGAGES**, 8.

MORTGAGES—

As to lease of railroad with pledge of "net earnings" accruing to lessee on account of business coming "from or over" leased road—See **RAILROADS**, 10, 11.

As to mortgage in preference of creditor—See **ASSIGNMENTS BY OPERATION OF LAW**.

1. Where, simultaneously with the execution of an absolute deed, it was agreed between the parties in writing that the grantor was to effect a sale of the property within two years, and the grantee was not to sell it in the meantime, unless at a profit, which was to be divided between the parties to the transaction, and the grantee was at any time within the two years to deed back the property upon the repayment to him of the purchase price, the deed is to be treated as a mortgage. *Meier v. Flinsbach, &c.* 139
2. Where husband and wife in executing a lease upon the wife's property for a term of years obligated themselves to take and pay for certain improvements to be erected by the lessee, even though the wife had no power to bind herself personally, the husband was personally bound and the wife had the power to bind her estate by mortgage to secure his obligation; and the lease, in so far as it created a lien, was in effect a mortgage. *Bullock, &c., v. Grinstead & Co.* 261
3. Where a married woman did not voluntarily acknowledge a mortgage executed by her on her land, and was not examined separately and apart from her husband, in an action to enforce the mortgage, she had the right, upon an allegation that the clerk had made a mistake in his certificate, to show the truth by parol evidence, the mortgagee having knowledge of the facts, having been present by agent at the time of the acknowledgment. *Aultman-Taylor Co. v. Frasure, &c.* 429
4. The wife's execution of the mortgage having been procured by fraud of the husband, in which the agent of the mortgagee participated, and also by coercion, the mortgage is void as to her whether the acknowledgment was regular or not. *Idem* 429

MOTIONS—

Rule of court requiring notice of motions does not apply to motion by plaintiff to dismiss his action, as the Civil Code makes it imperative upon the court to sustain such a motion. *Northwestern Mutual Life Ins. Co. v. Barbour, &c.* 7

Negligence. New Trial.

NEGLIGENCE—

As to negligence of railroad company as to trespassers—See RAILROADS, 13.

As to negligence of railroad company as to employes—See RAILROADS, 3, 14, 18-20.

1. A master is not liable for an injury to one of his servants by the negligence of another servant of the same grade or rank and engaged in the same field of labor, although the negligence was gross. *Volz v. Chesapeake, &c., R. Co.* 188
2. In an action under section 3 of chapter 57, General Statutes, to recover for the killing of one person by the willful neglect of another, there can be no recovery, unless the person killed left either widow or child. And where the petition alleges "gross and willful neglect," the action will be regarded as under section 3, just as if willful neglect alone had been alleged. *Hackett, adm'r, v. Louisville, &c., R. Co.* 236
3. Where the death of one person is caused by the negligence of another, and there is an interval of suffering between the time of injury and the time of death, the representatives of the decedent can not recover both for the suffering and for the death, but must elect. Therefore, where the administrator has filed his petition seeking to recover for the death, he can not file an amended petition to recover for the suffering. *Idem* 236
4. Where the plaintiff fails to reply to a plea of contributory negligence the defendant is entitled to judgment on the pleadings, provided the attention of the trial court is called to the failure to reply. *Lou. & Nash. R. Co. v. Copas* 460
5. A railroad brakeman engaged in coupling and uncoupling cars in the yard of the company is not guilty of contributory negligence in riding on a ladder on the side of a freight car in going from one point of work to another. *Martin, adm'r, v. Lou. & Nash. R. Co.* 612
6. An engineer on a railroad train is liable directly for his own negligence and can not escape responsibility upon the ground he was acting merely as agent for another. *Idem* 612

NEW TRIAL—

As to excessive verdict—See VERDICTS, 1.

As to necessity for motion—See APPEALS, 1.

1. Newly discovered evidence which was not of a decisive or controlling character did not authorize a new trial. *Johnson, &c., v. Stivers, &c.* 128
2. The court properly refused to set aside the default judgment and allow the defendant to file answer, as he was given thirty days after his demurrer was overruled in which to file answer, and offered no excuse for his failure to do so, except that he was ignorant of his

New Trial. Notice.

NEW TRIAL—Continued.

- duty in that regard. The fact that his attorney said to him after his demurrer was overruled that he could go home did not give him reason to believe that the case had been finally disposed of. *Chaffin v. Fulkerson* 277
3. Although the lower court erred in setting aside a former verdict for plaintiff upon the ground that it was against the evidence, this court will not now direct a judgment to be entered for plaintiff upon that verdict, for while it has in some cases given such a direction, yet where, as in this case, the defense is supported by strong probabilities, and in the opinion of the trial judge presents an absolute bar to recovery, the court is not inclined to apply that rule. *Couadeau v. American Accident Co.* 280
4. Although the court upon the former trial erred in overruling exceptions to defendant's depositions upon the ground that the witnesses resided within twenty miles of the court house, this court will not treat the case as if the depositions had not been read, and for that reason direct the entry of judgment upon the first verdict, as the defendant should have an opportunity to produce the witnesses at another trial. *Idem* 280
5. Where the court required defendant to first produce his evidence and afterward changed its ruling as to burden of proof and gave plaintiff concluding argument to jury, there was such "irregularity" as entitled defendant to new trial, although the burden was properly upon plaintiff. *O'Connor & McCulloch v. Henderson Bridge Co.* 638

NON-RESIDENTS—See WARNING ORDER.

NON-SUIT—See PEREMPTORY INSTRUCTION.

NOTICE—

As to notice of application for druggist's license with privilege of selling liquor—See LIQUOR SELLING, 7.

1. Section 625 of Civil Code prescribing the mode of serving notice applies to service of notice of an election contest. *Broadbuss v. Mason* 420
2. Under that statute, which provides that if a person to whom a notice is directed can not be found at his usual place of abode, it may be served by leaving a copy "there" with a person over the age of sixteen years, residing in the same family with him, it is not material whether the person who received the notice was at the time in touch of the place of abode of the person to whom the notice was directed, or two hundred yards away, if he was in other respects a proper person to leave the paper with, and undertook to deliver it to the person to whom it was directed, or put it within the abode where he could get it on his return. Moreover, as the person to whom the notice was directed in this case had left the county to

Notice. Officers.

NOTICE—Continued.

- avoid service of notice, he is not in a position to question the sufficiency of service, especially as he had, and availed himself of, full opportunity to make defense to the proceeding. *Idem* 420
3. Rule of court requiring notice of motions does not apply to motion by plaintiff to dismiss his action as the Civil Code makes it imperative upon the court to sustain such a motion. *Northwestern Mut. Life Ins. Co. v. Barbour, &c* 7
4. Notice to agent of mortgagee of mistake in clerk's certificate of acknowledgment and of fraud in procurement of mortgage was notice to principal. *Aultman-Taylor Co. v. Frasure, &c* . . . 429

NUNC PRO TUNC ORDERS—

The mere recollection of the judge of a court of what took place at a former term is not sufficient to authorize an addition to, or an amendment of, the record in regard to any order or judgment. There must be something in the record by which to amend. The County Court had no power to make a *nunc pro tunc* order approving and accepting a county levy bond executed at a former term. *Boyd County, &c., v. Ross* 167

OBTAINING MONEY BY FALSE PRETENSES—

Where it was the duty of the "timekeeper" of a railroad company to keep an accurate account of, and report to the company at the end of each month, the number of trips made by each train conductor in the service of the company, and the timekeeper, pursuant to a conspiracy with one of the company's conductors, reported that the latter had, during a particular month, made more trips than he had in fact made, and the company, relying upon that report, paid the conductor a larger amount than he was entitled to receive, the conductor, by reason of his combination and agreement with the timekeeper to defraud the company, was guilty of obtaining money by false pretenses, being as much a principal in the offense as if he had made the false report in person. *Commonwealth v. Barnett* . 302

OFFICERS—

As to right of one summoned to aid officer in making arrest to defend himself—See SELF-DEFENSE, 2.

As to newspaper criticism of public officers—See LIBEL.

As to time of expiration of terms of city officers elected under old Constitution—See ELECTIONS, 2.

As to mistake of officer in certifying acknowledgment—See MORTGAGES, 3.

As to power of Legislature to change compensation of officer during his term—See CONSTITUTIONAL LAW, 6.

As to right of Legislature to delegate to courts power to fix salaries—See CONSTITUTIONAL LAW, 7.

Officers. Options.

OFFICERS—Continued.

1. While an officer had no right to shoot in order to stop the flight of one who was fleeing to escape arrest for a mere breach of the peace, yet if he had reasonable ground to believe that he was in danger of losing his life or suffering great bodily harm at the hands of the person he was seeking to arrest, he had the right to shoot in his self-defense. *Doolin, &c., v. Commonwealth* 29
2. The provision in a city charter that the legislative, executive and ministerial power of said city shall be vested in certain officers named, "and such necessary deputies or assistants as may be required," can not be construed as denying authority to the Board of Councilmen to create other offices besides those enumerated in that section, and this would be true even if the power to appoint necessary deputies or assistants was not given in express terms. Therefore, notwithstanding such a provision in a city charter, the Board of Councilmen had power to create the office of "foreman of street repairs and overseer of the poor," such an office or offices being necessary to carry out the provisions of the charter. *Collopy v. Clougherty* 330
3. In this action to recover such an office, it was not necessary for the plaintiff to set forth in his petition the entire ordinance of the Board of Councilmen creating the office in question, but to state substantially only so much thereof as is necessary to show *prima facie* his title and right to recover. Nor was it necessary for plaintiff to allege in terms he was eligible to the place, as it was not the duty of the Board of Councilmen to prescribe in terms any specific conditions or qualifications for such an office. *Idem* 330
4. As it is alleged a quorum of the Board of Councilmen was present when plaintiff was elected to the office, and he received a majority of the votes, all was alleged that was necessary on the subject, for whether a majority of a quorum was a sufficient number of votes to elect is a question to be determined by reference to the charter, and about which there can be no controversy. *Idem* 330

OPTIONS—

As to option to renew lease—See LANDLORD AND TENANT, 1.

An optional agreement to convey, although without any covenant or obligation to purchase and without any mutuality of remedy, will be enforced in equity if it is made upon proper consideration, or forms part of a lease or other contract between the parties that may be the true consideration for it.

Where it was stipulated in a lease of land to a railroad company that at the expiration of the lease the company should have the right to purchase the land at a certain price, the agreement was binding on the lessor, although there was no obligation upon the part of the lessee to purchase, the other undertakings of the lessee being a sufficient consideration. *Bacon v. Ky. Central R. Co.*, 373

Ordinances. Partnership.

ORDINANCES—

As to construction of city ordinance granting railroad company right to use of streets—See RAILROADS, 7.

PARTIAL TRANSCRIPT—See APPEALS, 2.

PARTIES TO ACTIONS—

Heirs not necessary parties to motion for recovery of land purchased by administrator at execution sale—See EXECUTORS AND ADMINISTRATORS, 1.

1. While all creditors are not necessary parties to an action by an administrator for the settlement of his intestate's estate, still they are entitled to be heard. And in a case like this, where creditors of a testator are claiming contract liens upon property which the testator has by his will charged with the payment of debts generally, the general creditors, or some of them, are necessary parties to the action. And the court in this case having improperly adjudged the existence of a lien, the general creditors not being parties to the action and having no one to represent them, the general rule that the reversal of a judgment does not affect the title of the purchaser at a sale made under the judgment, does not apply, and the sale as well as the judgment should be set aside. *Payne, &c., v. Johnson's ex'rs*. 175
2. In an action by a devisee against co-devisees for contribution, all the devisees not being parties, each defendant is liable only for his part upon the basis that all are solvent and able to contribute. *Jones, &c., v. Bigstaff, &c.* 395

PARTITION—

As to implied warranty of title in division of land among devisees—See CONTRIBUTION.

Where land was divided under order of the County Court and the report of division confirmed, each owner taking possession of the share allotted him, although deeds of partition were never executed, the division must be regarded as effective as if a grant had been expressly made by the one owner to the other. *Jones v. Bigstaff, &c.* . . 395

PARTNERSHIP—

As to rights of partnership and individual creditors under assignment—See ASSIGNMENTS FOR CREDITORS, 5.

1. Where the names of two of three partners were, by the request of the third partner, signed to a note for money borrowed to be used, and which was used, for partnership purposes, the names signed must be regarded as the firm name for that particular transaction, and the firm is bound on the note just as if the usual firm name had been signed. And renewals signed in the same way also bind the firm. And while such a renewal, after the death of the third partner, did not bind him, yet as there was no intention to release him

Partnership. Patents.

PARTNERSHIP—Continued.

- from the payment of the original note, and it was canceled through inadvertence, he remained bound thereon. *National Exchange Bank of Lexington v. Wilgus' ex'ors* 309
2. The fact that one is to receive a certain part of the profits of a business in consideration of services, and also in consideration of his furnishing a house in which to carry on the business, does not constitute him a partner. *Fuqua & Smith v. Massie & Sons* 387
3. Where a firm, consisting of father and sons, purchased a building for partnership purposes, paying for it with capital furnished by the father, and with the father's consent an interest in the property was conveyed to each of the sons by separate deed, the property, although thus conveyed, is to be regarded as partnership property and treated as personality for the payment of partnership debts; and therefore the wives of the partners are not entitled to dower as against the claims of partnership creditors. *Hill, &c., v. Cornwall & Bro.'s ass'ee* 512

PASSWAYS—

1. The right to a passway may be created by prescription over woodland as well as over inclosed land. In either case the use of the way as a matter of right for the period of fifteen years perfects the right. *Hansford v. Berry* 56
2. If the owner of land over which another has acquired a right of way by prescription wishes to inclose his land, he may apply to the county court to discontinue the right of way thus established and have another right of way opened for the benefit of the person who has acquired the right, and upon such an application the court will take into consideration the equities of all the parties, and act accordingly. *Idem* 56

PATENTS—

1. Entries, surveys and patents are not void merely because they contravene some statutory regulation, unless the statute declares that they are void if issued in contravention of its provisions, or that they shall be deemed fraudulent if made and issued under certain circumstances. *Kirksey v. Turner* 226
2. A patent issued in contravention of a statute which contains no such declaration, being valid upon its face, can not be attacked in a collateral proceeding and disregarded by showing some latent defect, such as would authorize a court to declare it invalid, and set it aside in a direct proceeding for that purpose. *Idem* 226
3. The Virginia act of 1781, setting apart the land west of the Tennessee River for military purposes, did not annul any prior vested right, and an entry made prior to the passage of the act vested an inchoate legal right which was perfected by a patent issued in conformity

 Patents. Personal Representatives.

PATENTS—Continued.

- therewith, although subsequent to the passage of the act. And this is true as to an entry made during the session of the Legislature at which the act was passed, as the act can not by construction relate back to the first day of the session so as to antedate entries which were in fact made prior to its passage. *Idem* 226
4. Even conceding that such entries were void, a patent to such land issued by the State of Kentucky in 1806 was valid, for the reason that, no title to the land having been vested in any individual under the Virginia act, the State of Kentucky had the right to authorize the appropriation of it to other uses, which she did by the act of 1795, and the patent issued in 1806 was an actual appropriation of it pursuant to that act. *Idem* 226
5. It is competent to prove the statements of dead persons as to where corner and line trees, which are gone, originally stood, and also to show the relative location and calls of adjoining surveys patented subsequent to the date of the patent in question. *Whalen v. Nisbet, &c.* 464

PEDIGREE—

Proof of declarations as to—See EVIDENCE, 9.

PEREMPTORY INSTRUCTION—

1. When the plaintiff has first made out his case it is not within the province of the court to take its consideration from the jury on the proof of the defendant, unless such proof is in the nature of an absolute bar to the recovery. *Coudeau v. American Accident Co.* 280
2. After the court has sustained a motion by defendant for peremptory instruction to the jury, but before such an instruction has been given, the plaintiff has a right to dismiss his action without prejudice, as there has been at that time no "final submission" of the case to the jury. *Vertrees' adm'r v. Newport News, &c., Co.* 314
3. A motion for a non-suit is a demurrer to the evidence only and does not require the court to examine the pleadings. *Lou. & Nash. R. Co. v. Copas* 460

PERPETUITIES—

Prohibition against alienation void—See DEVISE, 17.

PERSONAL PROPERTY—

As to right of testator to destroy by will—See DEVISE, 12.

- Five-story brick buildings erected by lessee to be purchased by lessor at expiration of the lease are a part of the realty and not personal estate. *Gray v. Cornwall's ass'ee* 566

PERSONAL REPRESENTATIVES—See EXECUTORS AND ADMINISTRATORS.

Vol. 95—46

Pleading.

PLEADING—

As to sufficiency of petition in ejectment—See **EJECTMENT**.

Usury purged although not pleaded—See **USURY**, 1.

As to right to amend petition for removal of cause from State court—See **TRANSFER OF SUITS**, 4.

As to right to file amended petition setting up new cause of action—See **NEGLIGENCE**, 3.

1. In an action against a railroad company to recover for injuries alleged to have been suffered by plaintiff from being kicked by a brakeman from a moving train upon his refusal to pay his fare, the fact that the act of ejection is charged in the petition to have been done willfully does not show the act to have been malicious on the servant's part, and therefore beyond the scope of his authority, as the servant is not charged with committing the act willfully, but the company is charged to have willfully done it by its agent and servant. *Smith, by, &c. v. Lou. & Nash. R. Co.* 11
2. The allegation of the answer that the plaintiff voluntarily swung himself off the train was but a denial of the averment of the petition that he was kicked off, and did not require a reply. *Idem* 11
3. In an action by the husband for a divorce the objection that the wife's answer asking alimony was not styled a "counter-claim" was waived by plaintiff joining issue on the matter set up in the alleged counter-claim. *Lacey v. Lacey* 110
4. Although an amended petition was tendered and an order made permitting it to be filed, yet as it is not in fact in the record, which is certified to be a complete transcript, the presumption must be that although plaintiff had permission to file it, it was not in fact filed. *Idem* 110
5. Where an administrator has sued for the death of his intestate, alleging it to have been caused by the negligence of defendant, he can not file an amended petition to recover for the suffering endured between the time of the injury and the time of death, as the two causes of action can not be joined. *Hackett, adm'r, v. Louisville, &c., R. Co.* 236
6. The defendant by filing a general demurrer to the petition entered his appearance. *Chaffin v. Fulkerson* 277
7. Where the plaintiff fails to reply to a plea of contributory negligence the defendant is entitled to judgment on the pleadings, although the plaintiff may by direct averment in his petition have negatived any negligence on his part. But if the case is tried as if the issue had been made, and the attention of the trial court is never called to the failure to reply, the right of the defendant to make any objection to the verdict and judgment against him on that account is waived. *Lou. & Nash. R. Co. v. Copas* 460
8. A motion by the defendant for a non-suit is a demurrer to the evidence only and does not require the court to examine the pleadings,

Pleading. Powers.

PLEADING—Continued.

- although if the court is, upon such a motion, apprised of the defendant's right to a judgment on the pleadings, it should grant the motion. But where the motion is overruled this court must assume, in the absence of anything in the bill of exceptions to the contrary, that the attention of the trial court was not called to the condition of the pleadings. *Idem* 460
9. In an action against a common carrier to recover damages for injury to live stock while being transported by it, a denial by defendant of knowledge or information sufficient to form a belief as to whether it injured the stock is not good. *Nashville, &c., R. Co. v. Car-rico* 489
10. Even though the petition in an action to quiet title was not sufficient, yet as defendants in their answer and counterclaim prayed for their title to be quieted, adverse to plaintiff, and tendered an issue involving question of superior title, it was competent for the lower court to try and determine it. *Magowan v. Branham, &c.* 581

PLEDGE—

As to lease of railroad with pledge of "net earnings" accruing to lessee on account of business coming "from or over" leased road—
See RAILROADS, 10, 11.

POWERS —See DEVISE, 1.

1. To authorize a deed to be treated as the execution of a power of appointment by the grantor, the intention to execute the power must be clear, so that the transaction shall not be fairly susceptible of any other interpretation. Therefore, where a devisee under a will took one-half his share in fee and the other half for life, and after his death "to such uses as he may declare, limit or appoint by deed or will," a deed executed by him conveying "all his right, title, interest and claim" in and to the property devised, can not be regarded as an execution of the power of appointment, and therefore passed the absolute estate in one-half the property described and only the grantor's life estate in the other half. *Payne, &c., v. Johnson's ex'ors* 175
2. While such is the general rule as to the execution of powers of appointment and is still the rule in this State as to the execution of such powers by deed, the rule as to the execution of such powers by will has been changed by our statute, under which a general devise of what the testator owns must be regarded as the execution of a discretionary power of appointment unless a different intention appears by the will. (Gen. Stats., chap. 113, sec. 22.) Therefore a devise by a testator of "what little property I have after the payment of my debts" passes property which had been devised to him for life and after his death to such uses as he might appoint by will. *Idem* 175

Powers. Practice in Civil Cases.

POWERS—Continued.

3. The testator by such a devise charged with the payment of his debts the property held by him for life with power of appointment, as he had a right to do. *Idem* 175
4. While a devise of an estate generally or indefinitely, with the power of disposition, passes the fee, yet where the first taker is given an estate for life only, that express limitation will control the operation of the power and prevent it from enlarging the estate into a fee. *Idem*, 175

PRACTICE IN CIVIL CASES—

As to right to judgment on pleadings—See PLEADING, 7, 8.

As to right of plaintiff to dismiss his action—See DISMISSAL OF ACTION.

As to right to transfer of equitable action for trial of legal issues by jury—See TRANSFER OF SUITS, 1, 2.

As to necessity for separation of conclusions of law and fact—See APPEALS 1, 4.

1. A rule of court requiring notice of motions does not apply to a motion which the Civil Code makes it imperative upon the court to sustain. *Northwestern Mut. Life Ins. Co. v. Barbour, &c.* 7
2. Special acts passed under the old Constitution regulating the practice in particular circuit courts were not repealed by the new Constitution but remain in force until the Legislature shall pass a general law regulating the practice in circuit courts. *Piper v. Gunther & Sons* 115
3. Pending an appeal with supersedeas from a judgment dismissing a petition by which the plaintiff claimed a life interest in an undivided third of a tract of land, the court, having retained the case on the docket for the purpose of making all necessary orders as to the division of the land between the defendants, had the power to divide the land and to rent out the one-third claimed by plaintiff, which was not allotted to either of the defendants; and the commissioner having rented out that part of the land under order of the court and the defendants having become the renters and executed their bonds for the rent, the court, upon the reversal of the judgment dismissing plaintiff's petition and the entry of a judgment allotting him the one-third of the land which had been rented pending the appeal, properly ordered executions to issue against defendants upon the rent bonds. *Parrish, &c., v. Ross* 318
4. Even if the court had no control, pending the appeal, over the one-third of the land claimed by plaintiff, yet the plaintiff, having ratified the action of the court in renting out the land, is entitled to recover on the bonds voluntarily executed by defendants for the rent of land which did not belong to them, but to plaintiff. *Idem* 318
5. In consolidated actions by the Commonwealth to recover taxes the court having overruled a demurrer to the plea of exemption inter-

Practice in Civil Cases. Prescription.

PRACTICE IN CIVIL CASES—Continued.

posed by the defendants, a dismissal of the petitions was bound to follow; and although the State afterward introduced testimony to sustain the allegations of its petitions and the petitions were dismissed on final hearing, neither a motion for a new trial nor a separation of the conclusions of law and fact was necessary to enable the Court of Appeals to review the questions of law, which were the only questions before the court, there being no contrariety of testimony. *Commonwealth v. Railroad Companies* 60

6. Upon return of case from Court of Appeals it was error to overrule motion for judgment for amount which Court of Appeals had held plaintiffs were entitled to in any event, and plaintiffs will be entitled, when case goes back again, to judgment for aggregate of principal and interest to date motion was made, with interest on the whole from that date. *O'Connor & McCulloch v. Henderson Bridge Company* 638

PRACTICE IN CRIMINAL CASES—

As to selection of jury—See JURIES.

1. An indictment having been transferred from the court in which it was found to another court upon motion by the Commonwealth for a change of venue, the former court was divested of jurisdiction, and a subsequent indictment found in that court for the same offense and all proceedings under it were void. *Smith v. Commonwealth* . 322
2. If an indictment is not indorsed "a true bill" it is not a valid indictment, and should be dismissed on demurrer.
Oliver v. Commonwealth 372
Pence v. Commonwealth 618
3. Failure of clerk to mark indictment "filed" does not invalidate it.
Pence v. Commonwealth 618

PREFERENCE OF CREDITORS—See ASSIGNMENTS BY OPERATION OF LAW.

PREJUDICIAL ERRORS—

1. Omission of word *feloniously* from instruction as to murder was not prejudicial error. *Omer v. Commonwealth* 353
2. Judgment of conviction in felony case reversed for failure to comply with law as to selection of jury, although defendant not shown to be substantially prejudiced. *Risner v. Commonwealth* 539

PRESCRIPTION—

As to right to use of passway by prescription—See PASSWAYS.

As to prescriptive right of city to use of footway on railroad bridge—See RAILROADS. 22.

Presumptions. Questions for Court and Jury.

PRESUMPTIONS—

As to transcript being complete—See **APPEALS**, 2.

As to death by accidental drowning—See **ACCIDENT INSURANCE**, 1.

PRINCIPAL AND AGENT—See AGENCY.**PROCESS—See WARNING ORDER.**

As to manner of serving notice—See **NOTICE**, 2.

In an action against a railroad company to recover damages for injury to stock while being carried by it, service of process was properly had upon the defendant's agent nearest the county seat of the county in which suit was brought, although in another county. *Nashville, &c., R. Co. v. Carrico*. 489

PROFITS—

As to right to account of in trade-mark case—See **TRADE-MARKS**, 6.

PROHIBITION—

1. A writ of prohibition will not be granted where the inferior court sought to be restrained has jurisdiction, although the complainant may fail to state facts sufficient to constitute a cause of action or the testimony may fail to sustain the cause of action alleged. *Goldsmith v. Owen, Judge* 420
2. Where a writ of prohibition is denied by the trial court on final hearing, an appeal with supersedeas does not continue in force, pending the appeal, a temporary preventive order prohibiting the inferior tribunal from acting until the application for the writ could be heard. The court is not inclined to extend to writs of prohibition the rule which continues in force a temporary injunction where an appeal is prosecuted with supersedeas from an order dissolving the injunction on final hearing; and especially so in view of the fact that a statute has been enacted changing that rule and leaving to the discretion of the trial judge, in each case, the entire question as to leaving the temporary injunction in force pending the appeal. And while that statute has not yet gone into effect, it should, as far as practicable, be followed. *Gibbs v. Board of Aldermen of Louisville* 471

PROHIBITORY LIQUOR LAWS—

As to construction of—See **LIQUOR SELLING**, 2-6.

PROPERTY—

As to right of testator to destroy by will—See **DEVISE**, 12.

QUESTIONS FOR COURT AND JURY—

1. In an action against a railroad company to recover for injuries alleged to have been suffered by plaintiff from being kicked by a brakeman

Questions for Court and Jury. Railroads.

QUESTIONS FOR COURT AND JURY—Continued.

- from a moving train upon his refusal to pay his fare, the court erred in submitting to the jury the question whether "it was a part of the duty of the brakeman, under his employment as brakeman, to eject or put off the train persons who failed or refused to pay their fare," that being a question of law for the court. *Smith, by, &c., v. Lou. & Nash. R. Co.* 11
2. In the contest of a will upon the ground of undue influence the question of the existence and exercise of such an influence upon the testator is peculiarly one for a jury. *Fry, &c., v. Jones, &c.* . . 148

QUIA TIMET—See ACTIONS TO QUIET TITLE.

RAILROADS—

- As to fellow servants—See MASTER AND SERVANT, 1.
 As to exemptions from taxation—See TAXATION, 1.
 As to venue of action against—See VENUE.
 As to service of process upon—See PROCESS.
 As to duty to instruct inexperienced servant—See MASTER AND SERVANT, 4.
 As to right to construct and operate street railway—See STREET RAILWAYS.
1. A brakeman on a railroad train, as well as the conductor, is conclusively presumed to have authority to eject trespassers or intruders, and if he uses unnecessary violence in doing so the company is responsible for the injury resulting, unless the act of the servant was malicious. *Smith, by, &c., v. Lou. & Nash. R. Co.* 11
2. The fact that the act of ejection is charged in the petition to have been done willfully does not show the act to have been malicious on the servant's part, and therefore beyond the scope of his authority, as the servant is not charged with committing the act willfully, but the company is charged to have willfully done it by its agent and servant. *Idem* 11
3. Where one railroad company receives cars of another company on its line of road for transportation, it is the duty of the company taking them to make careful superficial inspection of their condition such as an ordinarily prudent man engaged in such business would make for the protection and safety of the employes required to handle the cars, and when there is a patent defect, and an injury occurs to an employe by reason of the defect that is unknown to him, the company is responsible. And this rule applies not only where the foreign car is out of repair, but where it is patent that it is so constructed as to render it more than ordinarily dangerous when attempting to couple it with other cars of different construction. *Lou. & Nash. R. Co. v. Williams* 199
4. Although section 218 of the Constitution requires railroad companies to receive for transportation cars belonging to other companies, still

 Railroads.

RAILROADS—Continued.

- if such cars are so constructed as to render it unsafe to handle them in the ordinary mode, it is the duty of the company to refuse to receive them. *Idem*. 199
5. While the Legislature has the power to grant to a railroad company the right to take land already appropriated to another public use, yet such an intention will not be presumed, but must be shown by express words or by necessary implication. Therefore a grant of power to lay out a railroad between certain termini where the precise course and direction are not prescribed, but are left to the corporation to be located between the termini, does not give authority *prima facie* to take the road-bed of a public highway as the track of the railroad or to destroy the highway by removing its support. And the fact that the corporation is authorized, in general terms, to construct "other branch roads," does not enlarge its power in this regard. *Lou. & Nash. R. Co. v. Whitley County Court* 215
 6. Where a railroad company in constructing its road cut through the outer base of a mountain and thus destroyed a county road running along the mountain side above the railroad, in an action by the county against the company to recover damages, a verdict for \$10,000 is not excessive, as the proof shows that a large section of the county is cut off from the county seat, and that whatever remedy may be found to relieve the people of that section, the cost will be largely more than the amount of the verdict. *Idem*. 215
 7. A city ordinance granting to a railroad company the right to the use of the streets of the city for the construction and operation of its road, and providing that the company "will pay to any property-owner all damages that may be recovered by such property-owner, either against said railroad company or against the city, on account of the construction, location or operation of said road, or by reason of the filling, excavating or grading prescribed herein, and said company shall indemnify and save harmless said city from any liability, direct or remote," is to be regarded as a contract binding the company to pay only such damages as were recoverable by the law then in force; the purpose of the contract being to indemnify the city and not to make the company liable for remote, contingent or speculative damages. *Henderson Belt R. Co. v. Dechamp, &c*. 219
 8. For an injury to his private rights the owner of an abutting lot may recover compensation from a railroad company, notwithstanding the grant of the right of occupancy by the municipal authorities. *Idem* 219
 9. In this action against a railroad company to recover damages for injury to abutting property resulting from the construction and operation of a railroad along the streets of a city, the court properly instructed the jury to find for plaintiffs if they believed from the evidence that the abutting property had been damaged by reason of the cut made

Railroads.

RAILROADS—Continued.

- by the company, or from the falling of soot and cinders upon the property, or from smoke entering the house or from the vibrations or concussions of the running trains, but for a diminution of the value of the property, if any, caused by, or resulting from, a mere dislike of residing near a railroad, or from smoke, cinders and soot as would fall on the property by reason of currents of wind, they were to allow no damage. *Idem* 219
10. Where a railroad company leased the unfinished road-bed and all the rights and franchises of another company for a term of years, and the lessor executed mortgage bonds and placed them in the hands of the lessee with which to raise money to complete the leased road, which was intended by the lessee as a "feeder" for its main line, and the lessee pledged for the payment of the interest on the bonds the "net earnings" which might accrue by reason of business "coming to it from or over" the leased road, the lessee thereby put in lien the net earnings not only on the business coming to the main line directly off the leased road, but also on the business received on the main line, and destined to points on the leased road. *Schmidt, trustee, v. Lou. & Nash. R. Co.* 289
11. In arriving at the "net earnings" to which bondholders are entitled for the payment of interest on their bonds, there should be deducted from the gross earnings accruing to the lessee from business coming to it on account of the leased road not only the cost and expense of handling this particular business, but a proportionate part of the total operating expenses of the company. But the losses incurred by the lessee in operating the leased road are not to be deducted from the net profits which the lessee made on its own lines from the business coming to it from the leased road, or such net profits are not to be applied to the payment of those losses before paying the interest on the bonds. *Idem* 289
12. The earnings as they are ascertained in the approved report of the commissioner should bear interest from the time they should have been applied under the contract in payment of the interest on the bonds. *Idem* 289
13. Where a boy ten years of age, in attempting to get upon a slowly moving engine in the private yard of a railroad company, fell upon the track, and being run over, was killed, the boy being a trespasser, the servants of the company were not required to anticipate his presence, and there being nothing to show that the engineer discovered his peril in time to avoid running the engine over him, the company is not responsible for his death. *Vertrees' adm'r v. Newport News, &c., Co.* 314
14. Where a car-coupler in the yards of a railroad company is injured in coupling cars as the result of the gross neglect of those whose duty

 Railroads.

RAILROADS—Continued.

- it was to load the cars properly, the company is liable. *Lou. & Nash. R. Co. v. Copas* 460
15. Denial by a railroad company of knowledge or information sufficient to form a belief as to whether it injured stock being carried by it is not good. *Nashville, &c., R. Co. v. Carrico* 489
16. Under a written contract between appellant and appellee, two railroad companies, whereby appellant consented that appellee might construct in appellant's freight yard a track for the purpose of connecting appellee's main track with one of the side tracks of appellant, the connection to be made under the supervision and to the satisfaction of an engineer of appellant, and to be constructed and maintained by appellee at its own expense, each company has the right to use the connecting track for the purpose of interchanging freight and passengers and transfer of cars from one main track to the other, but neither company has the right to occupy it or use it for any other purpose without the consent of the other. *Lou. & Nash. R. Co. v. Ky. Midland R. Co.* 550
17. The writing does not import a mere license given without consideration and revocable at pleasure by appellant, but is in substance and meaning an agreement whereby appellant, for a valuable consideration, sells and grants a joint and equal interest in that part of its freight yard occupied by the track in question. *Idem* . . . 550
18. A railroad brakeman, engaged in coupling and uncoupling cars in the yard of the company, is not guilty of contributory negligence in riding on a ladder on the side of a freight car in going from one point of work to another. *Martin, adm'r, v. Lou. & Nash. R. Co.* 612
19. Where a track in the yard of a railroad company was reserved and kept clear for the use of another company, and the servants of the latter company left "dead" cars standing on the track in such close proximity to a track used by the former company as to come in contact with the body of a brakeman riding on the ladder of a car moving on that track, resulting in his death, the latter company is liable. *Idem* 612
20. The company in whose yard the cars were left standing is not liable, as the engineer of the train on which the brakeman was riding at the time of his death could not discover the danger by reason of the darkness, and the "dead" cars had not remained in their dangerous position such a length of time as to afford the yardmaster a reasonable opportunity of discovering the danger. *Idem* . . . 612
21. The negligent engineer is liable directly for his own negligence and can not escape responsibility upon the ground that he was acting merely as agent for another. *Idem* 612
22. Where a railroad company maintained for more than thirty years a footway on a bridge across a stream dividing a city, the city acquired

Railroads. Rent.

RAILROADS—Continued.

the right to the use of the footway by prescription, and the company having torn down the old bridge and erected a new one leaving off the footway, it was properly required by the chancellor to restore the way. *Ky. Cen. R. Co. v. City of Paris* 627

RATIFICATION—

As to ratification by city council of mayor's employment of attorney—See **TOWNS AND CITIES**, 2.

RECEIVERS—

A suit against a receiver of a railroad company appointed by judgment of a United States Circuit Court to recover damages for alleged improper construction and operation of road is a suit "arising under the Constitution and laws of the United States," and subject to removal from a State court. *Hardwick v. Kean, rec'r* . . . 563

REMAINDERS—

As to sale of real estate in which infants own a remainder interest—See **SALES OF INFANTS' REAL ESTATE**.

1. Under a conveyance to one for life, remainder to his "children, heirs and legal representatives," the life tenant not having any children, the fee remained in the grantor, and upon his death vested in his heirs, and a conveyance from them to the life tenant vested in him the fee, subject to be defeated by his having children. The title did not remain in abeyance ready to vest in whoever might be the heirs of the grantor at the time of the death of the life tenant, and therefore a brother of the life tenant having united in the conveyance to him and afterward died before he died, the children of that brother are estopped by his conveyance to claim any interest in the land, as they take from their father and not from their grandfather. *Coots v. Yewell, &c.* 367
2. It was not the intention of the grantor to pass the fee to the heirs of the life tenant in the event he died without children. *Idem* . . . 367

REMOVAL OF CAUSES—See **TRANSFER OF SUITS**, 3, 4, 5.

RENT—

As to power of lower court to rent out land pending appeal, and as to right to execution on rent bond—See **PRACTICE IN CIVIL CASES**, 3.

As to right of contractor to subject rents of ward's land to pay for improvements—See **GUARDIAN AND WARD**.

Although property in which an interest was conveyed by a father to his daughter was used by the father and his sons in their partnership business, the daughter, having failed for several years to assert any claim for rent, ought not, after the firm has made an assignment for

Rents. Sales of Infants' Real Estate.

RENT—Continued.

the benefit of creditors, be heard to assert such a claim, it being manifest from the payments made by the father for both the daughter and her husband that no claim for rent was intended to be asserted. *Hill, &c., v. Cornwall & Bro.'s ass'ee* 512

REPEAL OF STATUTES—See STATUTES, 1-5, 9-11.**REPLY—**

As to necessity for—See **PLEADING, 2, 7.**

REVOCATION—

As to right of assignee for creditors to exercise power of revocation reserved by assignee in a deed executed by him prior to the assignment—See **DEEDS, 2.**

ROADS—See PASSWAYS.

As to destruction of highway by construction of railroad—See **RAILROADS, 5, 6.**

A county may maintain an action for injury to its public roads. *Lou. & Nash. R. Co. v. Whitley County Court* 215

RUNNING WITH LAND—

Where one of several joint devisees loses by paramount title a part of the estate devised, he is entitled to contribution from the other devisees, and this implied warranty of title passes to his heir, but it does not pass to one to whom he sells the devised land. *Jones, &c., v. Bigstaff, &c.* 395

SALARIES--

As to power of Legislature to change during term of office—See **CONSTITUTIONAL LAW, 6.**

Where salaries are required by the Constitution to be fixed "by law," the Legislature can not delegate that power to the courts. *Commonwealth, by, &c., v. Addams, Clerk* 588

SALES

As to sales of land for taxes—See **TAX SALES.**

As to sales by trustees—See **TRUSTS, 3.**

As to purchase of land by administrator at execution sale—See **EXECUTORS AND ADMINISTRATORS.**

Prohibition against alienation void—See **DEVISE, 17.**

SALES OF INFANTS' REAL ESTATE—

Real estate in which infants own a remainder interest can be sold only for the purpose of reinvestment, as provided by section 491 of the Civil Code. There can not be a sale of such property under section 490 of the Code. And the fact that the life tenant, as guardian for the

Sales of Infants' Real Estate. Self-Defense.

SALES OF INFANTS' REAL ESTATE—Continued.

infant remaindermen, asks a sale of the property, alleging that the owners are joint tenants and that the property can not be divided, does not vest the possession in the remaindermen so as to authorize the sale. Therefore, the purchaser at such a sale does not acquire such a title as a court of equity will require one who has purchased from him to accept. *Malone v. Conn., &c.* 93

SCHOOLS—

1. Where, under the act of 1798, donating lands to the different counties of the State for the purpose of establishing seminaries of learning, the trustees, in whom was vested the title and control of the lands donated to a particular county, have, under legislative authority, sold the lands and with the proceeds erected buildings and established a school in accordance with the provisions of the act, the Legislature has no power to take from these trustees or their successors the title to the property and vest it in the trustees of the common school district. And this is true, although the original act making the donation provided that it should "be subject to any future order of the Legislature," it being also provided that "the donation herein made shall forever continue appropriated to the use of seminaries." And even if the Legislature had the power to apply the property to common school uses, it would have no right to give it to one of the school districts of the county to the exclusion of the other districts. *Graded School District No. 2 v. Trustees of Bracken Academy* 436
2. While the grant is irrevocable, the power exists on the part of the judiciary, when called upon, to see that the trustees of this fund, or of the buildings and grounds, use them as a seminary for educational purposes, and to remove them and appoint others upon their failure in good faith to carry out the purposes of the donation. *Idem* 486

SELF-DEFENSE—

1. Upon the trial of appellant for murder the court erred in instructing the jury that they might acquit "if they believed from the evidence that at the time he did the shooting (if he did do it) he was in immediate danger of death or great bodily harm then about to be inflicted on him, or which reasonably appeared to him about to be inflicted on him, by deceased, and from which he had no other safe, or to him apparently safe, means of escape." This instruction required the jury to believe the danger to have been real before they could acquit, without regard to the defendant's reasonable belief as to the existence of the danger. *Cockrill v. Commonwealth* . . . 22
2. The defendant, who had been summoned to aid a deputy sheriff in arresting an offender, having been driven from the ground at the

Self-Defense.

SELF-DEFENSE—Continued.

- point of a knife by the deceased, who was a friend of the resisting prisoner, had the right to return, and having done so, it was error for the court to instruct the jury that it was his duty to escape impending danger by flight. And it was also error, under the circumstances, to give an instruction denying defendant the right to act in his self-defense if he voluntarily returned and renewed the difficulty, unless after such return he abandoned said difficulty in good faith before the shooting of deceased. *Idem* 22
3. Even if an instruction based upon defendant's return and renewal of the difficulty was authorized, it was error to require the jury to believe, "beyond a reasonable doubt," that defendant had abandoned the difficulty, as this was to require him to establish his innocence beyond a reasonable doubt. *Idem* 22
4. An instruction denying a defendant the right to act in his self-defense if he had "other safe, or to him apparently safe, means of escape," is objectionable, for the reason that it might be construed to mean that the defendant must seek to escape by means not absolutely safe, but merely apparently so. *Idem* 22
5. One who is charged with murder may be excusable upon the ground of self-defense, although the deceased might, if he had taken the life of the accused, have also been excusable upon the same ground, as each might have been mistaken as to the purpose of the other. *Doolin, &c., v. Commonwealth* 29
6. While an officer had no right to shoot in order to stop the flight of one who was fleeing to escape arrest for a mere breach of the peace, yet if he had reasonable ground to believe that he was in danger of losing his life or suffering great bodily harm at the hands of the person he was seeking to arrest, he had the right to shoot in his self-defense. And this is true, although the fleeing offender had reason to believe from the cries of the crowd and from the fact of the officer pursuing him with a gun that the officer was about to shoot him, and was attempting to protect himself from the supposed danger at the time he was wounded by the officer. *Idem* 29
7. Although it appeared upon the trial of appellant for murder that the deceased had threatened to take his life, had shoved him off the sidewalk in passing him on the street, and on one occasion had put his hand in his pocket as though to draw a weapon, when the defendant got behind a tree, the defendant was not entitled to an instruction telling the jury in substance that if these things were true the defendant had reasonable grounds to believe that the mere presence of the deceased put him in peril, and that he was not bound to wait until he was actually assaulted before acting in his self-defense. It is only where the previous assault manifests a deadly intent that such an instruction is authorized. *Haverly v. Commonwealth* 33
8. The court erred in instructing the jury that in order to acquit upon the

Self-Defense. Statutes.

SELF-DEFENSE—Continued.

ground of self-defense, they must believe the killing was necessary, or seemed to defendant in the exercise of a reasonable judgment to be necessary, in order to avert or "escape" the danger, real or apparent. The word "escape" is not proper in such an instruction under any circumstances, and is particularly improper and misleading when used in reference to a person accused of homicide, who is assaulted in his own yard and near to his own dwelling-house, as was the case here. He then may stand his ground, and is not required to flee or "escape." *Eversole v. Commonwealth* . . 628

SEPARATION OF CONCLUSIONS—See **APPEALS**, 1, 4.

SEPARATE ESTATE—See **HUSBAND AND WIFE**, 5, 8.

SHERIFFS—

As to liability of surety in sheriff's revenue bond who has signed in ignorance of fact that other sureties were not bound—See **BONDS**, 3.

SLANDER—See **LIBEL**.

SOLE CORPORATIONS—See **CORPORATIONS**, 4.

SPECIFIC PERFORMANCE—

A city having acquired by prescription the right to the use of a footway on a railroad bridge and the city having torn down the bridge and constructed a new one leaving off the footway, it may be compelled in an action brought for that purpose to restore the way. *Ky. Cent. R. Co. v. City of Paris* 627

STATE—

As to claims against—See **CLAIMS AGAINST STATE**.

STATE CHARITIES—

As to right of action against House of Reform for assault on inmate—See **CHARITABLE INSTITUTIONS**.

STATUTE OF FRAUDS—See **FRAUDS**, **STATUTE OF**.

STATUTES—

As to particular provisions of General Statutes construed—See **GENERAL STATUTES**.

As to sections of Kentucky Statutes construed—See **KENTUCKY STATUTES**.

As to Code provisions construed—See **CODES OF PRACTICE**.

1. The act of May 5, 1884, providing for the exemption from taxation, for the period of five years, of all railroads thereafter built in this State, was repealed by the general revenue law of May, 1886, which, after providing for the taxation of "all property," except such as was specifically exempted by its provisions, provided for the repeal of

Statutes.

STATUTES—Continued.

- certain acts by their titles, "and all other acts, general and special, and parts of acts inconsistent herewith or not in conformity herewith." *Commonwealth v. Railroad Companies* 60
2. The fact that the act of May 5, 1884, was, subsequent to the time at which the general revenue law of 1886 went into effect, embodied in an edition of the General Statutes, which was adopted by the Legislature, can not be regarded as a legislative construction that the act of 1884 was not repealed by the general revenue law, as that law with its repealing clause is found later on in the same edition. *Idem* 60
3. If the language of an act be certain its object can never be defeated by any amount of contemporaneous interpretation, no matter how consistent or how widely adopted it may have been. It is only where the words of the statute are of doubtful meaning that the courts will resort to contemporaneous interpretation. *Idem* 60
4. The repeal of the act of 1884 is inoperative as to railroads the construction of which was commenced prior to September 14, 1886, the date at which the repealing act took effect, as the Legislature had no power to withdraw the exemption from those who had expended their money upon the assurances of the act. *Idem* 60
5. The act of 1856, reserving the right to repeal or amend charter privileges granted by the Legislature to particular persons, has no application to the law of 1884, which was a general law affecting alike all who accepted its provisions or acted on the strength of them. *Idem* 60
6. Special acts passed under the old Constitution regulating the practice in particular circuit courts were not repealed by the new Constitution, but remain in force until the Legislature shall pass a general act regulating the practice in circuit courts. *Piper v. Gunther & Sons* 115
7. While the general rule of interpretation is that full effect must be given to every word in a statute, still, where the object of the Legislature is plain and its intent gathered certainly from the whole context, the use of a single word that would render the act meaningless and absurd should be disregarded; or, if it is manifest from the context that such a word has been carelessly used for another word, the word intended should be substituted if necessary to give effect to the legislative purpose as gathered from the whole law.

An act of the Legislature creating a taxing district and providing for the imposition of a tax to pay the cost of constructing turnpike roads provided that the "width" of the macadam shall not be less than eight inches nor more than fifteen inches. *Held*—That as a literal interpretation of the word "width" would lead to an absurdity and defeat the purpose of the act, in construing the statute the word "depth" will be substituted, it being manifest

Statutes. Stockholders.

STATUTES—Continued.

- that was the word intended. *Bird, &c., v. Board of Commissioners of Kenton County* 195
8. The Virginia act of 1781 setting apart the land west of the Tennessee river for military purposes did not annul any prior vested right, and an entry made prior to the passage of the act vested an inchoate legal right which was perfected by a patent issued in conformity therewith, although subsequent to the passage of the act. And this is true as to an entry made during the session of the Legislature at which the act was passed, as the act can not by construction relate back to the first day of the session so as to antedate entries which were in fact made prior to its passage. *Kirksey v. Turner* 226
9. An act approved May 5, 1884, making it unlawful to sell liquor in Hardin County, which took effect upon its ratification by the voters of the county at an election held for that purpose, as provided by the act, was not repealed by an act approved March 15, 1890, entitled "An act resubmitting to the voters of Hardin County the question as to whether or not spirituous, vinous or malt liquors shall be sold in said county." the latter act, which provided for a vote by magisterial districts, being intended merely as an amendment to the act of May 5, 1884, it being manifest that it was the intention that the act of 1884 should continue in force—except in such districts as might under the act of March 15, 1890, vote in favor of the sale of liquor. But even if that intention did not appear from the act itself, an act passed May 22, 1890, and at the same session, expressly amending the act of 1884, is sufficient to show that the Legislature did not by the act of March, 1890, intend to repeal the act of 1884. *Kirkpatrick v. Commonwealth* 326
10. Even if the act of 1884 was repealed by the act of March, 1890, as the act of May 22, 1890, shows that it was the intention to amend it merely, the court will, in order to effectuate that intention so clearly expressed, treat the act of May 22, 1890, as re-enacting the act of 1884. *Idem* 326
11. The act of April 10, 1893, entitled "An act relating to crimes and punishments," was intended to be a complete system of statutory law relating to crimes and punishments; and as a consequence to supersede or repeal all existing statutes on that subject. Therefore, section 96 of that act (section 1223, Ky. Stats.) is to be regarded not merely as an amendment to the act of April 11, 1873, known as the "Kuklux law," but as a substitute for the entire act. *Buchannon v. Commonwealth* 334
12. Statute followed as far as practicable, although the time fixed for it to go into effect has not yet arrived. *Gibbs v. Board of Alderman of Louisville* 471

STOCKHOLDERS—See CORPORATIONS, 2, 3.

Street Railways. Subrogation.

STREET RAILWAYS—

1. Where the right to construct and operate a street railway has been granted by resolution or ordinance of the council of a city, in pursuance of authority conferred by act of the General Assembly, the right thus given is as valid and effectual as if conferred directly by the General Assembly. *Louisville Bagging M'fg Co. v. Central Passenger Ry. Co.* 50
2. The overhead wire or trolley system of operating street railways by electricity is not so dangerous and does not so obstruct the streets of a city as to authorize the courts to either enjoin or limit the movement of street-cars in that way. *Idem* 50
3. The plaintiffs can not enjoin the construction of a railway track in front of their manufacturing establishment upon the ground that it will prevent the loading and unloading of vehicles by backing them up to and at right angle with the sidewalk, as this manner of loading and unloading necessarily obstructs the proper use of the street for other vehicles, and, besides, is forbidden by city ordinance. *Idem* . 50

STREETS—

1. Where the right to construct and operate a street railway has been granted by resolution or ordinance of the council of a city in pursuance of authority conferred by act of the General Assembly, the right thus given is as valid and effectual as if conferred directly by the General Assembly. *Louisville Bagging M'fg Co. v. Central Passenger Ry. Co.* 50
2. Although each of several deeds of partition of a tract of land provided that the calls and descriptions of streets and alleys therein contained should not be construed to be a dedication of such streets and alleys, yet, as the city has at great expense constructed a bridge across a creek at its intersection with one of the streets designated in the deeds of partition, and the street has been improved, without any effort on the part of the owners of the land bordering thereon to enjoin the construction of the bridge or the improvement, a dedication of the street must be implied; and the owners of the several quarter squares bordering on the improvement must pay therefor. *Caperton, &c., v. Humpick* 105

SUBMISSION—

As to what is *final submission* of case—See DISMISSAL OF ACTION, 3.

SUBROGATION—

Where money borrowed by a devisee was applied to the extinguishment of liens on the land devised which had been created by the testator, that fact did not entitle the creditor to be substituted to the rights of the lienholder. Having taken indemnity from the devisee by way of mortgage he obtained in that way all he bargained for. *Payne, &c., v. Johnson's ex'ors* 175

 Substitution. Taxation.

SUBSTITUTION—See **SUBROGATION**.

As to substitution of one word for another in interpretation of statute—See **STATUTES**, 7.

SUMMONS—See **PROCESS**.**SUPERSEDEAS**—

As to effect of—See **PRACTICE IN CIVIL CASES**, 8; **PROHIBITION**, 2.

As to right to disregard supersedeas improperly issued—See **APPEALS**, 9, 10.

SURETIES—

As to liability of surety signing bond in ignorance of the fact that other sureties were not bound—See **BONDS**, 8.

SURVEYS—See **PATENTS**.**SURVIVOR**—

Word *survivor* as used in will construed—See **DEVISE**, 7.

TAXATION—

1. The act of May 5, 1884, providing for the exemption from taxation for a period of five years of all railroads thereafter built in this State was repealed by the general revenue law of 1886; but that repeal is inoperative as to railroads the construction of which was commenced prior to September 14, 1886, the date at which the repealing act took effect, as the Legislature had no power to withdraw the exemption from those who had expended their money upon the assurances of the act. *Commonwealth v. Railroad Companies*. 60
2. Although under the act of May, 1884, amending the tax laws of the city of Louisville, the right of the city to sue for taxes does not accrue until the first day of May of the second year after the assessment, yet limitation as to such a suit begins to run from the time the taxes are distrainable, and the right of action is barred after five years from that time. The right to sue is merely an additional remedy in aid of the ordinary remedies for the collection of taxes, and the fact that the right to this remedy is postponed does not prolong the period of limitation. *City of Louisville v. Johnson* 254
3. The failure of the ministerial officer to enforce the remedies given him does not affect the right of the city to sue. *Idem* 254
4. Under the provisions of the act, the tax bill authenticated by the signature of the assessor, or a *fac simile* thereof, is *prima facie* evidence of the liability, and places the burden on the defense of showing the defects, if any. The defendant may, however, by a plea denying that the assessor ever signed such a bill, place upon the city the burden of showing that it was signed by the assessor. *Idem* . . . 254

 Tax Sales. Towns and Cities.

TAX SALES—

1. The State, having purchased land at a tax sale, has the right under the statute to sue for and recover possession of the land so purchased, if not redeemed within the time prescribed, *Commonwealth v. Three Forks Coal Company* 278
2. To make a tax sale valid and to give the purchaser, whether the State or an individual, right to recover possession of the land so sold for taxes, there must be a substantial compliance with all the requirements and conditions of the statute. Therefore, in this action by the Commonwealth to recover possession of land purchased at tax sale, the petition failing to allege that defendant had no personal property in the county subject to distraint for the taxes due, a general demurrer was properly sustained, as a sale of the land could not be legally made if there was such personal property out of which the taxes could be paid. *Idem* 278

TERMS—

Of courts in continuous session—See **COURTS**.

TIME—

As to when time is of essence of contract—See **LANDLORD AND TENANT**, 1.

As to time of expiration of lease—See **LANDLORD AND TENANT**, 2

As the fraction of a day is not regarded in law, the sale or gift of liquor at any time during the twenty-four hours of an election day is a violation of the statute prohibiting the sale or gift of liquor "upon the day" of any general or primary election. *Commonwealth v. Murphy* 38

TITLE—

As to title in abeyance—See **REMAINDERS**, 1.

TOWNS AND CITIES—

As to right to use of streets to construct street railways—See **STREET RAILWAYS**.

As to construction of city ordinance granting railroad company use of the streets of the city—See **RAILROADS**, 7.

As to creation of office by city council—See **OFFICERS**, 2, 3.

As to election by city council—See **OFFICERS**, 4.

As to right of city to compel railroad company to restore footway on bridge—See **RAILROADS**, 22.

As to time of expiration of terms of city officers elected under old Constitution—See **ELECTIONS**, 2.

1. The mayor of a city has no power either to authorize litigation on behalf of the city or to control it unless the emergency be serious and the necessity grave and impending. *City of Owensboro v. Weir, Weir & Walker* 158
2. Although the vote of a city council upon a motion to allow the claim

Towns and Cities. Trade Marks.

TOWNS AND CITIES—Continued.

- of an attorney shows that an appropriation was refused merely because there was a disagreement as to the amount, still it can not be regarded as a ratification of the mayor's employment of the attorney. It shows at most but a willingness upon the part of a majority of the council to make some appropriation in compromise of the claim. *Idem* 158
3. Where a city has been assigned by the Legislature to a particular class, as provided by section 156 of the new Constitution, it must remain in that class until changed by the Legislature. The courts have no power to transfer it to another class upon the ground that its population was not sufficient to entitle it to a place in the class to which it was assigned. *Green, &c., v. Commonwealth* 238
4. Section 158 of the new Constitution, limiting the indebtedness of towns and cities, became operative immediately upon the adoption of the Constitution, the maximum limit of the indebtedness of a particular town or city being determined by the class to which cities of its population were required by the Constitution to be assigned, although the classification had not then been made by the General Assembly. *Beard, &c., v. City of Hopkinsville* 239
5. The prohibition of that section is against incurring a legal liability to pay in any manner or for any purpose, when a given amount of indebtedness has previously been incurred, and therefore a debt payable upon the happening of some event, such as the rendering of service or the delivery of property, is within the prohibition. And it can make no difference whether the debt be for necessary current expenses or for something else. Nor does the fact that the liability is within the limits of the revenue accruing to meet it prevent the prohibition from applying. *Idem* 239

TRADE-MARKS—

As to prohibition by testator of use of— See DEVISE, 10, 12.

1. The lessees of Blue Lick Springs, who handle the water of those springs as an article of commerce, and who have for many years used the name "Blue Lick Water" as their trade-mark, are entitled to the exclusive use of that name as a trade-mark, and upon their petition the defendants, who handle a mineral water obtained from an artesian well in a distant part of the State, are enjoined from using the words "Blue Lick" as a part of their trade-mark. *Parkland Hills Blue Lick Water Co. v. Hawkins & Co.* 502
2. Where a brand consisted of the letters and words "O. F. C. Hand-made Sour Mash Whisky, E. H. Taylor, Jr., Distiller," the essential feature of the trade-mark was the letters "O. F. C." *Geo. T. Stagg Co. v. E. H. Taylor, Jr., & Sons* 651
3. Where a corporation doing business under the name of E. H. Taylor, Jr., Co. used such a brand, the subsequent use as an adjunct to this

Trade-Marks. Transfer of Suits.

TRADE MARKS—Continued.

- brand of the *facsimile* of the signature of E. H. Taylor, Jr., sometimes with the addition of the word "Company," can not be regarded as making that signature a part of the trade-mark, and upon the withdrawal of Taylor from the corporation the corporation had no right to use his autograph. *Idem* 651
4. The use of another's autograph as a brand is a fraud upon the public. *Idem* 651
 5. The statement in the registration of a trade-mark that certain words of the brand may be omitted shows that they are not regarded as a part of the trade-mark. *Idem* 651
 6. While the defendants were properly enjoined from using the name of Taylor as a part of their trade-mark, the plaintiffs are not entitled to an account of profits, as the defendants acted under color at least of title and conveyance from Taylor and without any fraudulent intent, the use of the name of E. H. Taylor, Jr., and his autograph being in the nature of a license or permit, which has not been abused or extended unreasonably. *Idem* 651
 7. The withdrawal of E. H. Taylor, Jr., from the E. H. Taylor, Jr., Co., and the purchase of all the stock of that corporation by a single stockholder, suspended the existence of the corporation so far as the public was concerned, and therefore E. H. Taylor, Jr., did not violate any of the legal rights of the sole stockholder of that corporation, who continued to operate the "O. F. C." distillery by assuming in connection with his sons in the operation of another distillery the partnership name of E. H. Taylor, Jr., & Sons although similar in appearance to the corporate name of "E. H. Taylor, Jr., Co." *Idem* 651
 8. An order of reference to a commissioner, with directions to take an account of profits, was merely interlocutory. *Idem* 651

TRANSFER OF SUITS—

1. Where in an action brought in equity the equitable right depends upon the decision of legal issues, concerning which the party is entitled to a jury trial, the case on motion should be transferred as matter of right to the common law docket to be tried by jury. The court has no right to refuse such transfer unless the case be purely equitable, in which case it has discretionary power as to the transfer, and may, at its discretion, obtain the advisory aid of a jury in coming to a correct conclusion upon any question of fact involved in the issues to be tried. *Carder & Vallandigham v. Weisenburgh* 135
2. The provision of the Constitution guaranteeing the right of jury trial means a trial according to the course of the common law, and secures the right only in cases where a jury trial was customarily used at common law. But in such cases the Legislature has no power to deprive a party of his right to a trial by jury by converting

Transfer of Suits. Trusts.

TRANSFER OF SUITS—Continued.

a legal right into an equitable one, or by giving the chancellor an exclusive right to try legal issues merely because there is some equitable right that arises out of the establishment of the legal issues.

Idem 135

3. The statute of the United States as to the removal of causes from State courts to the Circuit Court of the United States does not in terms require any other proof of a fact stated as a cause for removal than affidavit of the party applying or his attorney. In this case, however, no question can arise about sufficiency of the proof, because the statement of the essential fact in the petition for removal not being controverted was properly accepted by the court as true. *Hardwick v. Kean, rec'r* 563
4. The defendant, having filed his petition for removal at the proper time, had the right, before plaintiff had taken any other step in the case, to file an amended petition setting up an additional cause for removal. *Idem* 563
5. A suit against a receiver of a railroad company, appointed by judgment of the Circuit Court of the United States, to recover damages resulting from alleged improper construction and operation of the road upon plaintiff's land, is a suit "arising under the Constitution and laws of the United States" and subject to removal from a State court to Circuit Court of the United States. *Idem* . . . 563
6. Transfer to equity of an action for damages was not improper where the criterion of recovery required the consideration of various items of account. *O'Connor & McCulloch v. Henderson Bridge Co.* 633

TRESPASSERS—

Duty of railroad company as to trespassers on track—See RAILROADS, 13.

TRUSTS—

As to right of action against charitable institutions—See CHARITABLE INSTITUTIONS.

As to power of courts to remove trustees—See SCHOOLS, 2.

1. Where a father as trustee for one of three daughters executed a conveyance to himself as trustee for the other two, although there was nothing in the deed itself to indicate the nature of the trusteeship or the terms or conditions of the trust, yet as it appeared from the evidence that the property conveyed was paid for out of an estate held by the father as trustee for his children under the will of their grandfather, the character of the holding by the trustee and the ultimate disposition of the interest of one of the beneficiaries upon her death are matters to be controlled by the will. *Lewis, &c., v. Citizens Nat'l Bank* 79
2. Where a debtor who made an assignment for the benefit of his creditors

Trusts. United States Courts.

TRUSTS—Continued.

was, by an agreement with the assignee, allowed to reserve his family residence in consideration of his removing a lien upon other property, and of his wife relinquishing her dower, the lien having with the knowledge and consent of the assignee been removed by the use of a fund held by the debtor in trust for others, the beneficiaries of the trust fund are entitled to be reimbursed out of the proceeds of the assigned estate, their money having been applied to the payment of the debts of the assignor with the knowledge and consent of the assignee. *Shinkle's ass'ee v. Bristow* 84

8. Where a husband conveyed land to a trustee for the use of his wife for life, remainder to their children, if any, and if not, to the grantor, with power to the trustee to sell and make a good title to the purchaser by the written consent of the wife, and to dispose of the purchase money as she might order in writing, the trustee named in the deed having resigned and a new trustee having been appointed in his stead, a contract for the sale of the land made by the new trustee and the wife will be enforced by the chancellor, as the wife has, by uniting in a conveyance with the trustee and her only child, given her consent in writing, and the husband has by tendering a deed confirmed her action. And while no power to sell under the provisions of the deed was conferred upon the new trustee at the time of his appointment, yet this power can be given as well after as at the time of the appointment, and this the chancellor has done by enforcing the contract. *The Coleman-Bush Investment Co. v. Figg, trustee* 403

TURNPIKES—

As to construction of statute providing for imposition of tax to pay cost of constructing turnpike—See STATUTES, 7.

UNDUE INFLUENCE—

Question as to its existence peculiarly one for jury—See WILLS, 8.

1. In any case where it is plain from the record that a party is seeking to recover usury, the chancellor should refuse to give judgment for the usury, although the plea is not made by the defendant. *Hill, &c., v. Cornwall & Bro.'s ass'ee* 512
2. Where a note is renewed, although the renewal is signed by others than those originally bound, all usury will be purged from the transaction so long as the original obligor remains liable. And a payment made at the time of the renewal, although made as a payment of usury, will be treated as a payment on the principal. *Idem* . 512

UNITED STATES COURTS—

As to removal of cause from State court—See TRANSFER OF SUITS, 8, 4, 5.

Vendor and Vendee. Warning Order.

VENDOR AND VENDEE—

As to verbal contracts for sale of land and as to sufficiency of memorandum—See **FRAUDS, STATUTE OF.**

As to option to purchase land—See **OPTIONS.**

Right of devisee to contribution against his co-devisees does not pass to one to whom he sells the devised land—See **CONTRIBUTION, 1.**

As to enforcement of contract for sale of land made by trustee—See **TRUSTS, 3.**

The levy of an execution upon land which has been sold by the debtor in good faith gives the creditor no lien upon the land or upon the unpaid purchase money due by the purchaser, and the purchaser not being restrained has the right, notwithstanding such a levy, to pay the money to the debtor. *Cooper v. Arnett, &c.* 608

VENUE—

As to change of—See **CHANGE OF VENUE.**

Where a contract made with a railroad company for the shipment of live stock provided for the transportation of the stock over the line of another company, which was to receive its proportion of the price of transportation, the former company must be regarded as having made the contract as the latter's agent, and an action against the latter company to recover damages for injury to the stock while being carried over its road may be brought in the county in which the contract was made by the former company. *Nashville, &c., R. Co. v. Carrico* 489

VERBAL AGREEMENTS—See **FRAUDS, STATUTE OF.**

VERDICTS—

A verdict against a railroad company for \$10,000 for destruction of a country road not excessive. *Lou. & Nash. R. Co. v. Whitley County Court* 216

VESTED RIGHTS—See **SCHOOLS, 1.**

VOLUNTARY CONVEYANCES—

Property given by a debtor to his children when he was in a prosperous pecuniary condition can not be subjected by his creditors. *Shinkle's ass'ee v. Bristow* 84

WARNING ORDER—

1. To entitle the plaintiff to a warning order it is not necessary that the required facts should be stated in a separate affidavit; if they are set out in the petition, and it is sworn to by the plaintiff, it is sufficient. *Wilson, &c., v. Teague* 47
2. A judgment against non-resident defendants will not be treated as void after the lapse of almost fifteen years, although the required affida-

Warning Order. Wills.

WARNING ORDER—Continued.

- vit had not been made at the time the warning order was made, as the petition containing a statement of all the facts required to authorize the warning order was sworn to after the order was made and at least a year before judgment was rendered, and the warning order attorney and the court acted upon the warning order after the affidavit was made; and, besides, the warning order itself recites that it was made upon proof as to the non-residence of the defendants. *Idem* 47
3. A judgment rendered pursuant to a warning order made by the clerk in due form will not be declared void in a collateral proceeding merely because the jurat of the affidavit for the warning order was not signed by an officer. *Sears' heirs v. Sears' heirs* 173

WARRANTY —

- Where one of several joint devisees loses by paramount title a part of the estate devised, he is entitled to contribution from the other devisees, and this implied warranty of title passes to his heir, but it does not pass to one to whom he sells the devised land. *Jones, &c., v. Bigstaff, &c.* 395

WILLS —

As to construction of — See DEVISE.

As to execution of power of appointment by will — See POWERS, 2.

1. In the contest of a will upon the ground of want of testamentary capacity on the part of the testatrix, letters written by the testatrix to one of the devisees were competent evidence to show her feelings to the devisee to whom they were addressed, and her intimacy with her. *Johnson, &c., v. Stivers, &c.* 128
2. The burden was on the propounders of the will to show by a preponderance of evidence that the testatrix was of testamentary capacity, and on the contestants to show by a preponderance of testimony that she was unduly influenced or coerced. *Idem* 128
3. In the contest of a will upon the ground of undue influence, the question of the existence and exercise of such an influence upon the testator is peculiarly one for a jury; and while the jury may not determine its presence without evidence of it, yet where it has been found by the jury to exist this court will hesitate to set aside that finding upon the ground that it is not supported by the evidence. *Fry, &c., v. Jones, &c.* 148
4. Where the wife by reason of an ante-nuptial contract had no interest in the husband's estate upon his death, neither she nor her administrator after her death had any right to appeal from an order of the county court admitting his will to probate. *Biggerstaff's ex'ors v. Biggerstaff's ad'mr* 154
5. In this contest of a will by which the only child of the first-born of the testatrix was, without reason, pretermitted, the ground of contest

Wills. Writ of Prohibition.

WILLS—Continued.

- being the want of testamentary capacity upon the part of the testatrix, the verdict of a jury "for the will" is set aside upon the ground that it is not supported by the evidence, the testatrix being a paralytic for whom everything done was first conceived by those around her, and her desires and intentions arrived at by asking her speculative questions, to which she could respond "yes" or "no," that being the extent of her ability to speak. *Mendenhall, &c., v. Tunge, &c.* 208
6. In reversing the judgment of the circuit court upon the verdict "for the will" this court does so with directions to the court to render a judgment directing the county court to reject the paper in contest. *Idem* 208
7. The fact that a writing is in form a deed is persuasive that a deed and not a will was intended, but it is not conclusive, and if it appears that no interest was intended to vest until after the death of the person named as grantor, the writing will, notwithstanding its form, be held to be a will. *Rawlings, &c., v. McRoberts, &c.* 346
8. Where a will which has been probated in another State is admitted to probate as a will of realty by a county court in this State upon a copy of the will and of the certificate of probate, the order of the county court is conclusive, except as to the jurisdiction of the court, "until the same is superseded, reversed or annulled," just as in the case of a domestic will; and the fact that the copy upon which the probate was had in this State does not show upon what proof the will was admitted to probate by the foreign court, does not render the order of the county court void. *Whalen v. Nisbet, &c.* 464
9. Where a will has been probated in another State and a copy of the will and of the certificate of probate are offered for probate in a county court in this State, proof that the State in which the will was probated had a statute like section 5 of our statute of Wills (chapter 113, General Statutes), which prescribes the requisites of a valid will, is sufficient to authorize the county court to probate the will as a will of realty. But it is immaterial in this collateral proceeding what proof was heard by the county court upon the motion to probate, the order of that court being conclusive until set aside. *Idem* 464

WITNESSES—

1. The fact that a witness is sworn and testifies entitles the adverse party to impeach his general reputation for truth without reference to the materiality of his evidence. *Davis v. Commonwealth* 19
2. It was competent to prove the bad reputation of a witness two years before the trial for the purpose of throwing light upon his reputation at the time of the trial. *Idem.* 19

WRIT OF PROHIBITION—See PROHIBITION.

1401



